

FILED
MAR 12 1992

OFFICE OF THE CLERK

No. 91-810

In The
Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

JOINT APPENDIX
VOLUME II, PAGES 219-417

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**Petition for Certiorari Filed November 18, 1991
Certiorari Granted January 27, 1992**

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE and	)	Civil Action
ROSE A. BESSETTE	)	No. 85-269
)	
v.)	
)	
CITY OF BURLINGTON)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs request an award of \$406,984.66 for all fees, costs and expenses incurred in the prosecution of this action. The total amount is comprised of \$7,295 for expert witness fees, \$3,634.66 for attorney expenses and a lodestar award of \$198,027.50 for which they request a 100% enhancement.

Defendant opposes Plaintiffs' request and contends that the relief obtained and the extent to which the Plaintiffs prevailed in this action do not justify or provide legal support for the lodestar award or the costs Plaintiffs seek. In addition, the enhancement requested by the Plaintiffs is foreclosed by a decision of the United States Supreme Court.

I. The Extent To Which The Plaintiffs Prevailed And The Relief Obtained Do Not Entitle The Plaintiffs To The Award Of Fees And Costs That Has been Requested

Plaintiffs' ten-count Complaint sought detailed and comprehensive prohibitory and mandatory injunctive

relief, imposition of civil penalties, compensatory and punitive damages,¹ costs and attorney's fees. When the action was commenced in October of 1985, Plaintiffs were seeking a preliminary injunction calling for immediate closure of the Defendant's landfill. They also sought the imposition of specific monitoring and remediation requirements.²

A determination of the extent of the Plaintiffs' success in the case necessarily entails a comparison of the the [sic] relief obtained with the relief sought. As the United States Supreme Court held in *Hewitt v. Helms*, 482 U.S. 755, 96 L.Ed.2d 654, 107 S. Ct. 2672 (1987), "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 96 L.Ed.2d 661. Further explication of the meaning of relief was provided by the Court in *Rhodes v. Steward*, 488 U.S. ___, 102 L.Ed.2d 1, 109 S.Ct. ___,

¹ Compensatory and punitive damages were sought in connection with Plaintiff's pendant state claims. Those claims were severed from the claims of federal and state statutory violations and are to be tried at a later date. The Citizen's Suits provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 and the Clean Water Act ("CWA") 33 U.S.C. § 1365, do not provide for awards of compensatory or punitive damages; and the State of Vermont's Ground Water Protection Act does not provide for an award of attorney's fees. Therefore, with respect to the issue of the relief obtained by the Plaintiffs, the inquiry is limited to the request for injunctive relief and imposition of civil penalties under RCRA and the CWA.

² The exact relief requested is set forth on pages 24 through 26 of Plaintiffs' Complaint. Those pages are attached as Appendix A to this Memorandum.

(1988). There the Court was dealing with an issue of attorneys fees under 42 U.S.C. §1988, in a case where, prior to the entry of judgment by the District Court, one of the plaintiffs died and the other was released from prison. As a result, the Supreme Court held, their claims of denial of due process concerning a magazine subscription were rendered moot. The Court went on to hold that a declaratory judgment would constitute relief only if "it affects the behavior of the defendant towards the plaintiff." *Id.* at 102 L.Ed.2d, 6. Because the case was moot before judgment issued, the judgment afforded no relief even though it declared that the defendant had not afforded the plaintiffs the proper procedural and substantive due process protections. Therefore plaintiffs were not entitled to recover attorneys fees.

Similarly in the case at bar, although this Court reached legal conclusions favorable to the Plaintiffs, the Opinion and Order did not "affect the behavior of the defendant towards the plaintiff." *Id.* This is not to say that the Court's Orders do not require anything of the Defendant. Certainly they do. But, what is required was either already done before the Order was entered or was something that the Defendant was already obligated to do under orders of the State of Vermont. The Defendants behavior toward the Plaintiffs insofar as this case is concerned, was mandated by the State and left unaltered by this Court's Orders.

With regard to the injunctive relief, the Plaintiffs requested injunctions requiring nine specific actions or cessations of actions (see Appendix A); and this Court

issued orders requiring the Defendant to undertake certain corrective actions and to close the landfill. Specifically, the Court ordered that the Defendant install and make operational by May 26, 1986, a methane gas control system and a leachate collection system (Opinion and Order dated March 26, 1986); and that the landfill be closed down by January 1, 1990 (Opinion and Order dated October 16, 1989).

While those Orders may relate to the relief requested by the Plaintiffs in paragraphs A, E and F of Plaintiffs' request for relief, they obligated the Defendant to do only what it was already required to do under orders issued by the State which, in turn, was authorized by EPA to implement RCRA in Vermont. Additionally, in the case of the March 26, 1986 Order, the work that was the subject of that Order had already been completed, albeit behind schedule, under compulsion of the January 31, 1985 Assurance of Discontinuance and an action brought in Chittenden Superior Court by the State of Vermont to enforce the Assurance.

It is true that relief need not be judicially decreed to justify an award of attorney's fees; and a law suit may prompt voluntary action on the part of the Defendant providing the relief sought by the Plaintiffs, *Hewitt v. Helms, supra*. However, in the case at bar there is no evidence that the conduct of the Defendant, to the extent that it provided the relief Plaintiffs were after, was a product of Plaintiffs' lawsuit. Instead, as the record shows, Defendant's efforts to improve its landfill were the result of the State's enforcement efforts and the Defendant's efforts to comply with the State's orders. With regard to the closure of the landfill, there can be no

question but that even if this Court's Order had not imposed a January 1, 1990 deadline, the Defendant would have still been required to close the landfill to meet the deadline imposed by the State. And, importantly, the Defendant has not presented any argument, against closing the landfill on that date, nor has it otherwise attempted to avoid its obligation to do so.

For these reasons, consistent with the holdings of the United States Supreme Court, Defendant contends that the Plaintiffs are not entitled to an award of attorneys fees.

II. The Lodestar Amount Requested is Too High.

Even if it is assumed that the Plaintiffs are entitled to recover some attorneys fees, by requesting an award for what purports to be *all* of the time expended on the case, Plaintiffs evidence ignorance of the standards established by the very opinions they cite. In both *Copland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) and *Sierra Club v. E. P. A.*, 769 F.2d 796 (D.C. Cir. 1985) the courts held that the lodestar award should not reflect unproductive time or time spent litigating claims upon which the party was unsuccessful. Partial or limited success should not be fully compensated.

In the case at bar, the Plaintiffs have met with a number of failures: they did not obtain a preliminary injunction requiring the immediate closure of the landfill; they were not successful in their claims that RCRA's permitting and notification requirements applied to defendant's landfill; they were not successful in seeking

to have the landfill declared an open dump; and, they were not successful in obtaining the relief requested in paragraphs A, B, C, D, G, H, I, J, L, or M of the Complaint (see Appendix A). Their total for fees also appears to include time spent in the unsuccessful appeal of this Court's March 26, 1986 Order to the Second Circuit Court of Appeals and time spent on the pendant state claims, for which no fees may be awarded.

If the Plaintiffs could be said to have achieved success by obtaining the two Court Orders, it was cumulative of the success the State and the City had already achieved in connection with the management of the landfill.

Because the Plaintiffs have achieved, at most, only partial success, Defendants request an opportunity to engage in discovery of Plaintiffs' counsel concerning the allocation of the time they represent has been spent on various aspects of the case. Defendant also requests a hearing before this Court on the question of Plaintiffs' attorney's fees. Any award of attorney's fees should be limited by the extent of plaintiffs' success. *Hensley v. Eckerhart*, 461 U. S. 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983).

III. Enhancement of the Attorneys Fee Award is Improper

Plaintiffs also seek a 100% enhancement of their legal fees citing, *inter alia*, *Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711, 97 L.Ed.2d 585, 107 S. Ct. 3078 (1987). However, in *Delaware Valley* the Supreme Court held that enhancements should *not* be awarded. Writing

for the majority Justice White observed that the reasonable hourly rate for a reasonable number of hours worked would "automatically" take into account any issues such as complexity and difficulty of the case. He wrote: "any further increase in this sum based on the risk of not prevailing would result not in a 'reasonable' attorney's fees, but in a windfall for an attorney who prevailed in a difficult case." *Id.* at 97 L.Ed.2d 599.

The Court in *Delaware Valley* did not close the door completely on fee enhancements; but it did clearly state that they were to be the exception rather than the rule. Accord, *Blum v. Stenson*, 465 U. S. 886, 79 L.Ed. 2d 891, 104 S. Ct. 1541 (1984). The Court held that even in the exceptional case where an enhancement was, in the informed discretion of the trial court, appropriate, the enhancement would be limited to 1/3 of the lodestar award.

Plaintiffs' request for any enhancement should be denied under the authority of the Supreme Court's holding in *Delaware Valley*.

CONCLUSION

Defendants oppose Plaintiffs' request for payment of attorney's fees and other expenses. Plaintiffs' degree of success was insufficient to support any award inasmuch as they did not obtain any new relief from or against the City; at best the Plaintiffs achieved only partial success and therefore would be entitled to only a partial award of the fees and expenses; in the event of a partial award, discovery and hearing will be necessary to fix the proper

amount of the award; and finally, no enhancement of the lodestar amount should be granted.

Dated at Burlington, Vermont this 13th day of November, 1989.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.

APPENDIX A

COUNTY X - UNCOMPENSATED TAKING

110. Plaintiffs incorporate by reference paragraphs 2 through 109 of this Complaint.

111. This count is brought under Chapter I, Article 2nd, of the Vermont Constitution to recover just compensation for the Defendant's partial taking of Plaintiffs' property.

112. The health hazards and environmental damage created by the Defendant's operation of the Landfill have substantially diminished the value and use of Plaintiffs' property and, as such, constitute a partial taking of Plaintiffs' property, for which Plaintiffs are entitled just compensation under Chapter I, Article 2nd, of the Vermont Constitution.

RELIEF

WHEREFORE, Plaintiffs request the Court to provide the following relief:

A. Issue a preliminary and permanent injunction which would, at a minimum, order Defendant to:

- 1) Immediately cease its acceptance of hazardous, solid or any other waste of any kind;
- 2) Cease the unlawful discharge of hazardous and toxic pollutants into the groundwater beneath and around the Landfill and into the surface waters of the Intervale;

B. Issue an Order directing Defendant to present to the Court within 30 days a plan to excavate and properly dispose of hazardous wastes in the Landfill;

C. Issue an Order directing Defendants not to alter any part of the Landfill without the prior approval of a court-appointed monitor (paid for by Defendant);

D. Issue an Order directing Defendant to present to the Court within 30 days a plan to purge the hazardous and toxic materials from the groundwater beneath and around the Landfill and from the surface waters of the Intervale;

E. Issue an Order to install and thereafter continuously operate a leachate collection drain system;

F. Issue an Order directing Defendants to present to the Court within 30 days a methane gas control and abatement plan to remove all possibility of a methane gas explosion on or near Plaintiffs' property and that of other affected property owners.

G. Issue an Order directing Defendant to report monthly to the court-appointed monitor;

H. Issue an Order directing Defendant to permit the court-appointed monitor to oversee Defendant in Defendant's implementation of corrective measures;

I. Issue an Order directing Defendant to obtain and file a bond or equivalent security with the Court;

J. Impose upon Defendant civil penalties pursuant to 42 U.S.C. § 6928(g) and 33 U.S.C. § 1319(d);

K. Award Plaintiffs all costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 6922(e) and 33 U.S.C. § 1365(d);

L. Award Plaintiffs the sum of \$500,000.00 in compensatory damages, and the sum of \$500,000.00 in punitive damages;

M. Issue an Order to restore the Plaintiffs' property to its original condition prior to the methane gas exploration.

N. Issue an Order that this Court retain jurisdiction to supervise the carrying out of any order entered by the Court concerning the remedial action to be taken by Defendant; and

O. Any other relief as the Court may deem equitable, just and proper.

Burlington, Vermont. 9 October 1985.

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.)	
DAGUE, II, BETTY DAGUE and	)	Civil Action
ROSE A. BESSETTE	)	No. 85-269
v.)	
CITY OF BURLINGTON)	

PLAINTIFFS' REPLY MEMORANDUM IN
SUPPORT OF THEIR APPLICATION FOR AWARD
OF FEES AND COSTS

In its opposition to Plaintiffs' request for fees and costs, Defendant claims: (1) Plaintiffs should get nothing because they did not really prevail in this action; (2) Plaintiffs should receive only a partial award because they achieved only partial success; and (3) enhancement of the lodestar is "foreclosed" by a decision of the United States Supreme Court. There is no merit to any of these claims.

I. THIS COURT HAS ALREADY DETERMINED THAT PLAINTIFFS HAVE SUBSTANTIALLY PREVAILED ON THEIR STATUTORY CLAIMS.

Defendant first challenges this Court's determination "that Plaintiffs have substantially prevailed in both their RCRA and CWA claims." It contends that Plaintiffs' success was so limited or insufficient to justify any award of fees and costs. According to Defendant, the extent of

Plaintiffs' success should be determined solely by comparing the relief obtained with the relief sought: it does not matter (to Defendant) that this Court found Defendant liable on four of the five statutory counts of Plaintiffs' Complaint.¹

Moreover, to suggest (as Defendant does) that this Court's Orders of March 26, 1986 and October 16, 1989 are merely superfluous to what it was already required to do under orders of the State of Vermont not only is audacious but flies in the face of a record replete with Defendant's non-compliance with one (extended) deadline after another in a series of Assurances of Discontinuance – the first of which dates back to December 15, 1981.²

In short, the Court has twice rejected Defendant's mootness argument. The Court has also determined that Plaintiffs have substantially prevailed on their statutory claims, and are entitled to their "costs of litigation" under 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

¹ If Defendant truly means what it says, it would not have wasted valuable judicial resources by vigorously contesting its statutory liability over the past four years, but would have simply consented to judgment on its liability under RCRA and the CWA.

² A review of the transcript of the emergency meeting held on Tuesday evening, November 14, 1989, between the City's Mayor, Board of Aldermen, and City Attorney, for example, reveals just how Defendant's conduct has been altered by this Court's Order of October 16, 1989. (Plaintiffs will file a copy of the transcript when it becomes available to the public – in about a week).

II. DEFENDANT'S GENERALIZED OPPOSITION IS INSUFFICIENT TO REDUCE THE LODESTAR.

Defendant next contends that even if Plaintiffs did prevail, the lodestar requested is too high. Defendant's opposition to Plaintiffs' fee request, however, is notable for what it does *not* contain, namely any specific objections to either the reasonableness of the rates charged or hours expended by Plaintiffs' attorneys. Defendant's failure to specify particular hours it believes to be excessive precludes it from contesting the lodestar amount, since generalized objections are an inadequate basis for such reduction. *Stokes v. City of Montgomery, Ala.*, 706 F.Supp. 811 (M.D. Ala. 1989).

Indeed, Plaintiffs submit that Defendant has, in effect, conceded that both the rates and hours spent are reasonable. Rather, Defendant argues only that Plaintiffs' success is partial or limited, at best, and asserts that they should not be awarded fees for their "failures."³ Defendant overlooks *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249 (2d Cir. 1987) and its holding that, when the issues are so intertwined factually, a fully compensatory fee

³ In its opposition, Defendant requests "an opportunity to engage in discovery of Plaintiffs' counsel concerning the allocation of the time they represent has been spent on various aspects of the case." With all due respect, Defendant has had the opportunity to review the 87 pages of Exhibit 1 attached to Plaintiffs' Application for Award of Fees and Costs. Such documentation makes clear that there is no need for discovery prior to any fee award and, indeed, such evidentiary proceedings have been met with disfavor by the courts. See *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980); *Konczak v. Tyrrell*, 603 F.2d 13, 19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1987).

award is justified even where a plaintiff did not prevail on all of his claims. See *United States Football League v. National Football League*, 887 F.2d 408, 58 U.S.L.W. 2257 (2d Cir. Oct. 10, 1989) (court held it was not error to include in the lodestar determination time spent on antitrust allegations dismissed prior to trial and other unsuccessful claims; "development of factual allegations and theories to support a claim is part of the normal litigation process and should be compensable.")

Thus, it is well-settled that a fee request should not be reduced or enhancement denied by mere application of a mathematical formula in which the total number of issues are blindly compared to the number of issues prevailed upon. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1940-41 n.11 (1983). Here, there should be no "artificial distribution" of attorney time between the successful and unsuccessful claims, as all the issues involved a "common core of facts" and were "based on related legal theories." *Dominic*, 833 F.2d at 1259.

III. THE REQUESTED LODESTAR SHOULD BE ENHANCED.

Finally, Defendant contends that any enhancement of the lodestar is improper, citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078 (1987) (*Delaware Valley II*). The United States Supreme Court recently affirmed, however, enhancement of reasonable hourly rates for the delay in payment of attorneys' fees. *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989) (an enhancement for delay in payment of a statutory fee award against a state governmental entity is permissible).

Since *Delaware Valley II*, numerous courts have also enhanced lodestar amounts based on a contingent fee arrangement between plaintiffs and their counsel. See, e.g., *Stokes v. City of Montgomery, Ala.*, 706 F.Supp. 811 (M.D. Ala. 1989) (court enhanced the lodestar 100 percent); *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1986) (100 percent multiplier affirmed); see also *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988) (100 percent enhancement affirmed). Lastly, there is simply no support whatsoever that in a case such as this the enhancement is limited as a matter of law to one-third of the lodestar. *Stokes*, *Fadhl* and *Palmer*, *supra*.

Plaintiffs submit that this is an appropriate case for a fee enhancement.

CONCLUSION

Plaintiffs' Application for Award of Fees and Costs is unchallenged on any specific grounds by Defendant. Accordingly, this Court should award Plaintiffs a lodestar amount of \$198,027.50, which fee should be doubled, together with an award of \$7,295.00 for expert witness fees and \$3,634.66 for expenses incurred in this action.

Plaintiffs further request that this Court order Defendant to pay Plaintiffs forthwith their "costs of litigation" under 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d), to ensure that Defendant does not prevail by conducting an economic war of attrition. To do otherwise will discourage other private attorneys general from engaging in public interest litigation to enforce the very statutes this

Court has already determined Defendant to have violated.

Burlington, Vermont.

22 November 1989.

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UNITED STATES DISTRICT COURT
FOR THE
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ERNEST DAGUE, SR.,)	
ERNEST DAGUE, JR.,)	
BETTY DAGUE AND)	
ROSE A. BESSETTE)	Civil Action
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SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

RCRA and the Clean Water Act each provide that if a party substantially prevails in the case, a court may award attorney's fees as appropriate (42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d)). Consequently, the threshold issue in this case with respect to the award of attorney's fees is whether or the Plaintiffs have substantially prevailed¹ in the lawsuit. Although this Court has stated in its Opinion and Order dated October 16, 1989, "that

¹ The requirement in RCRA and the Clean Water Act that the fee seeking party "substantially prevail" suggests a more exacting standard than applies in cases governed by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. That Act uses only the term "prevailing" and not the term "substantially prevailing." In the cases that have applied that act and standard, it has been held that the party must show that they received "at least some relief on the merits" of the claim before they can be said to prevail. (*Hewitt v. Helms*, 482 U.S. 755, 759, 96 L.Ed.2d 654, 661, 107 S. Ct. 2672 (1987), (emphasis added)). If some relief establishes a status as a prevailing party, presumably substantial relief must be obtained to be characterized as a substantially prevailing party.

Plaintiffs have substantially prevailed in both their RCRA and CWA claims," Defendant, City of Burlington, respectfully submits that even though the Court may have concluded that the Plaintiff prevailed on a majority of the legal issues in the case, nevertheless, the Plaintiffs have not "substantially prevailed" as those terms have been interpreted in decisions concerning the award of attorney's fees.

It is clear that the Plaintiffs did not prevail completely. The Court held in favor of the Defendant on several issues and denied much, if not most, of the relief Plaintiffs had requested. The relief which was granted was, as Defendants have previously argued, identical to the obligations imposed on the City by the State of Vermont. In effect, this Court's opinion evidences the Court's approval of the measures and time table established by the State for closure of the City's landfill and for mitigating any adverse affect that the landfill might otherwise have on the environment.

It is equally clear that the extent to which a party may have prevailed is directly measured by the extent to which the party obtained relief. As the U.S. Supreme Court held in *Rhodes v. Stewart*, 488 U.S. ___ 102 L.Ed.2d 1, 109 S. Ct. ___ (1988) "in the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of fees." *Id.* at 102 L.Ed.2d 6.²

² The Court in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 92 L.Ed.2d 439, 106 S. Ct.

(Continued on following page)

Accepting, for the purposes of discussion at least, that in an environmental action relief need not be personal to the plaintiff or a class of plaintiffs, but may instead relate to a thing or a practice or activity of the defendant; nevertheless, to be considered prevailing, a party must still obtain some of the relief sought (in the case of Clean Air Act (42 U.S.C. 7604(d) or civil rights claims) or a substantial amount of the relief sought (in the case of Clean Water Act or RCRA claims). It is further submitted that, in keeping with *Rhodes v. Stewart* and *Hewitt v. Helms*, *supra*, the defendant's obligation with respect to the subject matter of the lawsuit must be changed by the lawsuit even if the defendant's obligations toward the plaintiff need not be directly affected. In this case the Defendant's obligation to the Plaintiffs or the subject matter of this lawsuit have not been changed by any orders of this Court.

During the period of time that this lawsuit has been pending (since its filing on October 9, 1985) the City of Burlington has undertaken the following activity with regard to the landfill.

1. Installation of the methane gas control system;
2. Installation of the leachate collection system; and
3. Preparation of the landfill for final closure.

(Continued from previous page)

3088 (1986) (Delaware Valley I) held that an award of attorney's fees under the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604(d) should be governed by the same principles of case law governing an award of fees under 42 U.S.C. § 1988.

While it is true that those same actions were the subject of orders issued by this Court and were within the scope of the relief sought by the Plaintiffs, the inquiry must not end here. The next question is whether the Plaintiffs' lawsuit (and hence this Court's Orders) were the cause in fact of those actions. *Child v. Spillane* 866 F.2d 691 (4th Cir. 1989) (an applicant must demonstrate that a casual connection exists between the relief obtained and the litigation), *Disabled in Action of Pennsylvania v. Pierce*, 789 F.2d 1016 (3rd Cir. 1986) (Case under the Rehabilitation Act of 1973 (29 U.S.C. § 794 and 42 U.S.C. § 1988; where case settled, plaintiff's lawsuit must be a material factor in prompting the defendant to afford relief) and *Posada v. Lamb County Texas*, 716 F.2d 1066 (5th Cir. 1983) (plaintiff's action under the Voting Rights Act, 42 U.S.C. 19731(e) was not a significant catalyst for and hence was not a cause in fact of the defendant's efforts to develop constitutionally adequate plans to protect minority voting rights; thus, attorney's fees not awarded.)

The chronology of events relevant to activities listed in items one, two and three above compel the conclusion that Plaintiffs' lawsuit was not the cause in fact of those activities. First, each of those three actions was mandated by the Assurance of Discontinuance dated January 31, 1985 and the March 1985 Order of the Chittenden Superior Court (Trial Exhibit 4). Second, the engineering and design work for the methane gas control system (MGCS) and the leachate collection system (LCS) were carried out by the engineering firm of O'Brien and Gere beginning in April of 1985 (see Affidavit of Steve Goodkind, see "Attachment A"). Third, final plans and specifications were completed by O'Brien and Gere by August, 1985.

Fourth, solicitation for bids on the installation on the MGCS and the LCS were sent out on September 5, 1985. Fifth, bids were received on October 5, 1985. Each of those activities or events occurred before the Plaintiffs commenced the instant action on October 9, 1985 and before the Plaintiffs gave notice to the City or any other entity that they were bringing the instant action (October 8, 1985).

Installation of the MGCS and LCS began on November, 1985. On December 18, 1985 the State brought suit against the City for missing the deadline for installation of the MGCS (12/2/85) and the LCS (9/2/85). The methane gas control system was operational on December 27, 1985, and both the leachate collection system and the methane control system were fully operational before March 26, 1986, the date of this Court's Order concerning Plaintiffs' request for preliminary injunctive relief.

Although the City had previously encountered delays and obtained extensions of deadlines or amendments to Assurances of Discontinuance, it cannot be presumed that but for the Plaintiffs' suit, similar extensions and delays would have occurred in this instance. *Posada v. Lamb County Texas, supra* (it could not be presumed that but for the plaintiff's actions, the Attorney General would not have complied with his legal duties). Furthermore, the fact that the City had obtained final engineering plans for the project and had solicited bids for the engineering work as well as the fact that the State was aggressively enforcing the state Court Order, all serve to rebut any suggestion that the Plaintiffs' case prompted the defendants actions.

In summary on this point, Defendant submits that the chronology of events pertaining to the landfill as they relate to and parallel the Plaintiffs' request for relief in the Orders of this Court demonstrate that the Plaintiffs' lawsuit did not function as a cause in fact of those events. In the words of the 5th Circuit Court of Appeals in *Posada*, "plaintiffs simply caught the train as it pulled out of the station." *Id.* at 1071.

PLAINTIFFS ACHIEVED LIMITED SUCCESS AT BEST

If this Court nevertheless concludes that a sufficient causal relationship exists between the lawsuit and the conduct of the Defendant pertaining to the landfill, Defendant contends that the Plaintiffs' success was not complete; and having obtained only limited success, Plaintiffs are only due payment of a limited amount of their attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983). The lodestar fee award requested by the Plaintiffs (\$198,027.50) should be reduced by the deleting charges pertaining to:

1. The Plaintiffs' failed effort to obtain preliminary injunctive relief;
2. Plaintiffs' appeal of this Court's decision on the request for preliminary relief;
3. Time spent on the common law tort claims for damages;
4. Time spent on the State Groundwater Act claim, 10 U.S.C. § 1390, *et seq.*; and
5. Repetitive or unproductive time.

Plaintiffs' accounting of fees while detailed, does not allow for a completely accurate allocation of the time among these various areas. However, excerpts from Plaintiffs' time records which relate in whole or in part to these challenged areas are reproduced in "Attachment B." Although it may not be possible to determine all of the hours spent in each of the challenged categories, it is possible to establish a reasonably conservative minimum numbers of hours spent in each of those categories.

The first two categories (preliminary injunction work and work on the appeal) are more procedural categories than substantive. Defendant recognizes that the issues covered by those two categories are intertwined with and indeed are the same as the RCRA and CWA issues raised by the Complaint. Still, Plaintiffs were unsuccessful in both of those efforts and both of those efforts reflect work that was not only unsuccessful, but repetitious of other work done in the case. In that regard, Defendant points out that prior to commencing the lawsuit, one of Plaintiffs' counsel spent in excess of 100 hours researching the law. Such thoroughness may be commendable, but when it is performed by an attorney who professes to be experienced in the substantive areas involved in the suit (Bland Affidavit Section 6, Page 4), Defendant questions either the degree of experience claimed or the need for the amount of research done. It is inappropriate to require the Defendant to pay for the repetition of that research to the extent it was involved in the preliminary injunction effort and the ensuing appeal. Not only should the repetitious research in those two efforts be disallowed, but all time spent in both of those efforts should be disallowed, both because of the lack of success and because the effort

had to be repeated in preparation for the trial on Plaintiffs' request for permanent relief.

With respect to time spent on the pendant [sic] state claim for damages, Defendant assumes that attorney's fees for work done on those common law claims in preparation for the upcoming trial of that case will not be awarded. By the same token, to the extent that time spent on those pendant claims is identifiable from the Plaintiffs' time records, it should also be disallowed.

With regard to the state Groundwater Protection Act, inasmuch as that act does not allow for an award of attorney's fees, to the extent that the time devoted to that effort can be identified from Plaintiffs' time records, it should be disallowed.

Finally, with regard to other repetitive or unproductive time, for many of the activities on the case, three individuals were involved in doing the same thing. Attorneys Pearson, Bland and legal assistant Case were often all in attendance at depositions, and hearings, or all were engaged in review of the same memorandum or preparation of the same motion. In that regard, Defendant challenges the appropriateness of the charge for the time of legal assistant Case.

Further in that same category, Defendant challenges a portion of the time spent by Plaintiff in putting together their application for an award of attorney's fees. A total of 58.9 hours with charges of \$4,709 expended in this effort is inordinate in light of the fact that Plaintiff's attorneys presumably have computerized billing and record keeping which should reduce to a minimum the amount of time necessary to compile the data pertaining

to attorney's fees, and in light of the fact that Plaintiffs' firm has had direct experience before this Court in seeking an award of attorney's fees and, therefore, should be well versed in the applicable law as well as presumable having done the requisite investigative work concerning reasonable attorney's fees for purposes of establishing the lodestar amount.

Defendant cites to *Dominic v. Consolidated Edison Company of New York, Inc.*, 822 F.2d 1249 (2nd Cir. 1987) and *U.S. Football League v. National Football League*, 887 F. 2d 408 (2nd Cir. 1989) as authority for their suggestion that no effort should be made to reduce the lodestar award due their limited success. In this argument, however, the Plaintiffs overlook the fact that unlike the age discrimination claim and the retaliatory discharge claim made by *Dominic*, or the antitrust claims in *U.S.F.L.*, Plaintiffs' RCRA claims concerning Defendant's notification and permit requirements were not inextricably intertwined with the other claims raised, nor are the Plaintiffs' common law claims of nuisance and trespass inextricably intertwined. Furthermore, deletion of the time spent on the preliminary injunction and the appeal does not entail an effort to draw a fine distinction between substantive issues. Rather, it simply requests disallowance of unsuccessful and repetitious efforts. Finally, Plaintiffs reliance on *Dominic* overlooks the instructions from *Hensley v. Eckerhart*, *supra*, that if there are related legal theories involving a common core of facts that are not susceptible of being delineated, the Court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 461 U.S. 424, 435, 76 Ed.[sic]2d 40, 51-52, 103

S. Ct. 1933, 1940 (1983). Therefore, if, due to the inter-relatedness of the events and subject matter of various aspects of the lawsuit particular hours of work cannot be eliminated, nevertheless, the Court should reduce the hours reasonably expended on the overall litigation so that it reasonably relates to the relief obtained. In both *Dominic* and *U.S.F.L.* the Second Circuit recognized this obligation. This Court is similarly constrained.

Defendant also challenges Plaintiffs' request for payment of its fees at its current rates. The Second Circuit has held in *New York Association for Retarded Children v. Carey*, 711 F.2d 1136 (2nd Cir. 1983), that lodestar amount should be calculated at the historic rate, not the current rate. In that case, the Circuit Court also established the requirement that contemporaneous time records be maintained in order to support the lodestar award. To the extent that Attorney Pearson did not maintain contemporaneous time records for the period of April 1985 to October 1985 (see affidavit of Attorney Pearson paragraph 7, page 3), his fees should be disallowed entirely. And to the extent that the time spent on the request for attorney's fees includes time spent in an effort to reconstruction Attorney Pearson's time, that time should also be disallowed.

NO ENHANCEMENT SHOULD BE ALLOWED

Plaintiffs identify several factors which they contend justify an enhancement of their fee in this case. These factors are the risk and amount involved; the novelty of the issues raised and the difficulties in prosecuting the case; the undesirability of the case; the skill required; the

experience and ability of the attorneys; the preclusion from other employment by the attorneys because of the delay; and the delay and the results obtained, citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984), Plaintiffs Memorandum in Support of Plaintiffs' Application for Fees and Costs at p. 5. But, those are not the proper criteria for determining whether or how much of an enhancement may be appropriate.

Defendant acknowledges having erroneously characterized the opinion in *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 97 L.Ed.2d 585, 107 S. Ct. 3078 (1987), (*Delaware Valley II*) as a majority opinion rather than a plurality. Therefore, this Court is not bound to apply enhancement in the manner called for by the plurality. However, the Opinion of Justice O'Connor to which courts have subsequently looked for guidance in awarding enhancements, see, e.g., *Stokes v. City of Montgomery, Ala.*, 706 F.2d 811 (M.D. Ala. 1989), does not support an enhancement award based on the factors cited by the Plaintiff. Justice O'Connor expressly agreed with the plurality that the legal risk of loss in a particular case would not support an enhancement. 483 U.S. 734, 97 L.Ed.2d 603. She also agreed the novelty of the issues raised or difficulties in prosecuting the case as well as the skill, experience and ability of the attorneys involved were all adequately compensated under the lodestar award. Justice O'Connor concluded that an enhancement is appropriate only to the degree that the relevant market compensates for contingency cases. The burden of proving that issue lies with the fee applicant. *Id.*

Assuming *arguendo* that an enhancement is appropriate in this instance, Plaintiffs have nevertheless failed to

meet their burden of establishing the degree of an enhancement because they have failed to establish the degree to which the relevant market compensates for contingency. The Affidavits of attorneys Michael G. Furlong, Robert A. Mello and Jon R. Eggleston are submitted in support of the Plaintiff's request. None of those attorneys professes to engage primarily in plaintiff's work. In fact, both Attorney Furlong and Attorney Eggleston state that their firms do little plaintiff's work. Each of the attorneys stated that when they do contingent work, the percentage of recovery is normally fixed at a level which would return more to the firm than would be charged at hourly rates; but none of the attorney's [sic] stated the degree to which their contingent return would exceed their hourly return. Therefore the plaintiffs have not established a basis for any contingency enhancement.

Without doubt attorneys hope to obtain a settlement or a damage award that results in a fee greatly in excess of their hourly rate. At times they succeed but in many instances the return is less. A contingency multiplier of the hourly rate based on what counsel in a particular market *hope* to see in contingent cases case [sic] can not logically support a request for enhancement by that same amount in all cases. Just as only some contingency cases actually yield a fee consistent with a high multiplier, only some "prevailing parties" prevail to the extent that a multiplier of the lodestar is appropriate. For the reasons set forth throughout this memorandum, the degree of success obtained by the plaintiff is insufficient to support a lodestar award, much less an enhancement of that award.

Plaintiffs also seek enhancement based on delay between the institution of the suit and its conclusion, a subject most recently addressed by the U.S. Supreme Court in *Missouri, et al. v. Jenkins*, ___ U.S. ___, 105 L.Ed.2d 229, 109 S. Ct. 2463, 57 U.S. Law Week 4735. In *Jenkins*, the Court held that an adjustment for delay in payment based on current rather than historic hourly rates or otherwise is within the contemplation of the statute. The Court did not hold that it was required in all instances. On the facts of the case before it, the delay had resulted in a substantial hardship, the plaintiff's firm was small and it incurred \$633,000 of debt to keep the firm running during the pendency of the suit. The Plaintiffs' firm in this case is not similarly situated. The firm is large and by all appearances prosperous. Based on the number of hours spent by Plaintiffs' counsel during the pendency [sic] of this case, even as substantial as they were, each of the attorneys and other staff still had the overwhelming majority of their work time available for other clients. In these circumstances, Defendant submits that a delay enhancement is not only unnecessary, but inappropriate.

SUMMARY

An award of any attorneys fees in this case is inappropriate and contrary to the standards established for such an award in this Circuit and by the United States Supreme Court. Plaintiffs have not prevailed, much less have they substantially prevailed as those terms have been interpreted in the context of attorneys' fee cases. Alternatively, and if this court nevertheless finds that the plaintiffs have prevailed, defendant request [sic] that in

the exercise of its discretion this court reduce the plaintiff's lodestar figure by at least 75 percent to reflect the limited success obtained. Defendant requests that enhancement of the lodestar be denied. The burden of proof is on Plaintiffs as fee applicants, to establish their entitlement and the reasonable amount. They have not discharged those burdens.

Dated at Burlington, Vermont this 7th day of December, 1989.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.
Attorney for Defendant

McNEIL & MURRAY

By: /s/ _____
Nancy G. Sheahan, Esq.
Attorney for Defendant

ATTACHMENT A
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,)	
ERNEST DAGUE, JR.,)	
BETTY DAGUE AND)	
ROSE A. BESSETTE	)	Civil Action
	)	No. 85-269
v.)	
CITY OF BURLINGTON)	

AFFIDAVIT OF STEVEN GOODKIND

I, STEVEN GOODKIND, being *first duly sworn*, hereby depose and state as follows:

1. My name is Steven Goodkind.
2. I am the City Engineer for the City of Burlington.
3. As such I have been directly involved with the operation of the City of Burlington's landfill. I have also been one of the primary technical representatives of the City of Burlington in its relations with the State of Vermont and private engineering firms.
4. In April of 1985, O'Brien & Gere Engineers were authorized to begin final design of the landfill leachate collection system and methane control system and capping.
5. In August of 1985, final plans and specs were received from O'Brien & Gere for the leachate collection and methane control systems.

6. Both systems were accepted by the State of Vermont as being designed to provide the level of control necessary to achieve compliance with the State Court Order of March, 1985, and the Assurance of Discontinuance.

7. On September 5, 1985, contracts for the leachate collection and methane control systems were sent out to bid.

8. The City executed contracts with Ralph B. Goodrich Company, Inc., on November 11, 1985, for installation of both systems.

9. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers.

10. Installation of the complete, as designed, methane control system was in place and operating prior to March 26, 1985. Final inspection by the manufacturer occurred on March 25, 1986.

11. The leachate collection system began operations on January 15, 1986. On that date, the associated pump station, the function of which was to pump collected leachate to the wastewater treatment plant. Until the pump station was completed on March 6, 1986, collected leachate was trucked to the wastewater treatment plant.

12. The complete, as designed, leachate collection system was in place and operating as of March 7, 1986.

13. I am personally familiar with the design and selection of both systems and based on that familiarity, I can say that the suit by the Dagues, et al, had nothing to do with the decision to install the systems, the design of

the systems, or the decision on when they should be or were installed.

Dated at Burlington, Vermont this 7 day of December, 1989.

/s/ Steven Goodkind
Steven Goodkind

Sworn and subscribed to before me this 7th day of December, 1989.

Before me Alison Coburn
Notary Public

ATTACHMENT B

EXCERPTS FROM PLAINTIFFS' ATTORNEY'S FEES RECORDS

Sample Entry -				
Date:	Atty:	Hours:		Amount:
Description of Services:				
04/11/85	MJC	4.4		154.00
Review landfill news articles; <i>photograph Dague property before excavation</i> ; conference with clients regarding retainer agreements.				
04/12/85	MJC	2.5		87.50
Conference with clients regarding revised retainer agreements; pick up City Attorney's letter regarding indemnification for excavation of Dague property.				

04/15/85	MJC	3.0		105.00
Property inspection of City excavation for sewer pipe; draft memorandum regarding principals in case.				
04/16/85	MJC	7.5		262.50
<i>Property inspection during initial search for sewer pipe; photograph same</i> ; conference with clients and Street Department personnel regarding methane problem; report to Attorney Pearson regarding same.				
04/17/85	MJC	7.5		262.50
Property inspection during renewed excavation for sewer pipe; photograph same; conference with Street Department officials and clients regarding same.				
04/18/85	MJC	5.5		192.50
Continued property inspection during excavation of clients' land; additional photographing; conference with Street Department personnel and clients regarding same.				
04/19/85	MJC	5.8		203.00
<i>Further property inspection and photograph same</i> ; conference with Attorney Pearson regarding methane levels on Dague property; develop test form for client use.				
04/29/85	MJC	1.0		35.00
Fact investigation at City Hall regarding finance board action.				
05/03/85	MJC	1.8		63.00
Conference with Attorney Pearson and clients regarding claims against City and City's liability for damages to Dague property; photograph recent excavation and restoration of law.				

06/10/85	MJC	2.7	94.50
Telephone conference with Ernie Dague, Jr. and Attorney Gretchen Bailey regarding status of City's replacement of clients' law; telephone conference with landscaping firms regarding feasibility of sodding and use; conference with clients regard [sic] same.			
06/11/85	MJC	0.5	17.50
Analyze possible solution to grass-growing problem for clients.			
06/13/85	MJC	0.6	21.00
Telephone conference with Attorney Gretchen Bailey regarding City's decision on clients' law; telephone conference with Betty Dague regarding same.			
06/14/85	MJC	1.0	35.00
Telephone conference with Attorney Gretchen Bailey regarding City's decision on clients' law; memorandum to Attorney Pearson regarding same.			
07/02/85	WWP	0.3	25.50
Analyze damages to clients' property			
07/02/85	MJC	1.2	48.00
Referencing law restoration			
07/09/85	MJC	1.0	40.00
Referencing damage to Dague lawn.			
07/17/85	MJC	1.2	48.00
Inspection of Dague property concerning law problems (including Attorney Pearson).			
10/06/85	RNB	4.3	193.50
Continue to revise Complaint, including sections on Plaintiffs' injuries and Count VIII on uncompensating taking; conference with Attorney Pearson regarding same.			

10/10/85	RNB	0.9	40.50
Preparation for preliminary injunction hearing.			
10/11/85	MJC	2.5	100.00
Preparation for hearing on Motion for Preliminary Injunction.			
10/14/85	RNB	7.2	324.00
Legal research on case law and commentary under RCRA and CWA; <i>Interview with Donald R. Bessette regarding his mother joining lawsuit</i> ; conference with Attorney Pearson regarding need for methane gas expert and expert on endangerment present by landfill.			
10/14/85	MJC	5.3	212.00
... conference with Attorney Pearson in preparation for preliminary injunction hearing; ... conference with Mr. Bessette regarding nuisance and methane gas claims and possibility of his mother joining lawsuit as Plaintiff.			
10/14/85	WWP	3.5	297.50
<i>Interview Mr. Bessette; draft retainer agreement; read notification regulations; identify experts for affidavits; review Complaint for factual basis.</i>			
10/15/85	RNB	6.2	279.00
Legal research of case law and legislative history of RCRA and CWA for preliminary injunction hearing; ... further preparation for hearing.			
10/15/85	MJC	0.8	32.00
... conference with Attorney Pearson regarding organization of file in preparation for hearing and further investigation in preparation for hearing.			
10/16/85	RNB	3.7	166.50
Legal research on requirement of security for the issuance of a preliminary injunction. . . .			

10/16/85	MJC	4.0	160.00
Interview Don and Rose Bessette at Mrs. Bessette's home; investigation of methane gas migration there; compile and sent expert materials to experts.			
10/17/85	RNB	4.2	189.00
Telephone conference with Dr. Roebuck of Dartmouth Medical School regarding review of data to testify to determine that landfill may present a substantial and imminent hazard. . . .			
10/18/85	MJC	1.0	40.00
Conference with Don Bessette and Louis Bessette.			
10/18/85	GLH	2.5	87.50
Interviews of property owners adjacent to the City landfill.			
10/21/85	MJC	2.2	88.00
Conference with Attorney Pearson regarding adding Rose Bessette as party plaintiff to lawsuit; conference with Dagues regarding same.			
10/22/85	RBL	2.5	150.00
Preparation for hearing on Motion for Preliminary Injunction. . . .			
10/22/85	RNB	7.3	328.50
. . . preparation for preliminary injunction. . . .			
10/23/85	WWP	5.5	467.50
. . . further research on preliminary injunction standards. . . .			
10/23/85	RBL	4.0	240.00
Legal research in response to Motion to Continue hearing for preliminary injunction;			

10/23/85	RNB	8.7	391.50
Draft affidavits in support of Motion for Preliminary Injunction; revise Memorandum in Opposition to Motion to Continue Hearing. . . .			
10/23/85	MJC	4.2	168.00
Telephone conference with Ruth Einstein and Julie Hackbarth regarding testimony at preliminary injunction hearing; . . . organize file in preparation for preliminary injunction hearing;			
10/24/85	WWP	3.0	255.00
Preparation and filing of affidavits; telephone conferences with experts; telephone conference with Ms. Smith; conference with clients; prepare for hearing.			
10/24/85	RBL	3.0	180.00
Draft additional language to supplement Memorandum In Opposition to Motion to Continue; draft memorandum on preliminary injunction standards.			
10/24/85	RNB	9.2	414.00
. . . preparation for hearing on preliminary injunction. . . .			
10/24/85	MJC	8.6	344.00
Preparation for preliminary injunction hearing. . . .			
10/25/85	WWP	4.0	340.00
Prepare for hearing on Motion for Preliminary Injunction.			
10/25/85	RNB	7.6	342.00
Draft Affidavit of of [sic] Dr. Frank Reed; preparation for hearing on preliminary injunction; telephone conferences with Hackbarth and Einstein regarding testimony at preliminary injunction hearing			

10/25/85	MJC	4.5	180.00
Meeting with clients to sign Affidavits for preliminary injunction hearing; inspect Bessette property; test basement yard and bank holes for presence of methane gas.			
10/26/85	WWP	2.0	170.00
Prepare for preliminary injunction hearing.			
10/27/85	WWP	12.0	1,020.00
Preparation for tomorrow's preliminary injunction hearing.			
10/27/85	RNB	11.2	504.00
Preparation for preliminary injunction hearing. . . .			
10/27/85	MJC	10.5	420.00
Preparation for preliminary injunction hearing. . . .			
10/28/85	WWP	10.0	850.00
Prepare for and represent clients at preliminary injunction hearing at federal court.			
10/28/85	RNB	7.4	333.00
Preparation for and assist at hearing on preliminary injunction.			
10/28/85	MJC	7.5	300.00
Prepare for and attendance at hearing; service of subpoenas; and conference with witnesses.			
10/31/85	MJC	10.5	420.00
Conference with Attorney Pearson regarding work in preparation for 12/10/85 court hearing. . . .			
11/01/85	MJC	0.8	32.00
Review photos for use at continued preliminary injunction hearing and/or trial.			
12/02/85	MJC	6.2	248.00
Preparation for 12/9/85 hearing;			

12/03/85	RNB	9.2	514.00
Preparation for hearing. . . .			
12/03/85	MJC	6.8	272.00
Attend Goodkind deposition. . . .			
12/04/85	RNB	9.4	423.00
Finish drafting proposed Findings of Fact; draft proposed Conclusions of Law;			
12/05/85	WWP	7.5	637.50
. . . prepare Motion and Memorandum for Sanctions (?); prepare for Monday's hearing.			
12/06/85	WWP	8.0	680.00
Review signed Interrogatories, Motion for Sanctions, prepare for Monday's hearing. . . .			
12/06/85	RNB	8.3	373.50
Extensive preparation for hearing on preliminary injunction.			
12/07/85	RNB	5.3	238.50
Revise proposed Findings of Fact; thorough review of deposition, transcripts and exhibits.			
12/08/85	WWP	13.0	1,105.00
Preparation for preliminary injunction hearing.			
12/08/85	RNB	11.2	504.00
Preparation for hearing on preliminary injunction. . . .			
12/08/85	MJC	13.0	502.00
Preparation for preliminary injunction hearing. . . .			
12/09/85	WWP	11.7	994.50
Prepare for and attend hearing; prepare for and take Countryman's deposition.			
12/09/85	RNB	11.7	526.50
Preparation for hearing; attend and assist at same; preparation for deposition of William Countryman; attend at same.			

12/09/85	MJC	10.6	424.00
Preparation for and attend preliminary injunction hearing;			
12/10/85	GLH	1.2	42.00
Assist in transporting and delivering files to federal court for hearing.			
12/10/85	RNB	8.4	378.00
Referencing preliminary injunction hearing.			
12/10/85	MJC	9.3	372.00
Preparation for and attend preliminary injunction hearing. . . .			
12/11/85	WWP	9.5	807.50
Preparation for and attend preliminary injunction hearing;			
12/11/85	RNB	5.2	234.00
Review Goodkind deposition exhibits concerning migration of methane from the landfill for use at the hearing; attend same.			
12/11/85	MJC	6.5	260.00
Preparation for preliminary injunction hearing;			
12/12/85	WWP	9.0	765.00
Preparation for and attend hearing.			
12/12/85	RNB	7.4	333.00
Draft preliminary statement and first argument of discussion re: preliminary injunction.			
12/12/85	MJC	6.5	260.00
Attendance and note taking at preliminary injunction hearing.			
12/13/85	WWP	9.0	765.00
Preparation for and attend hearing.			
12/13/85	RNB	7.5	337.50
Draft memoranda concerning preliminary injunction hearing.			

12/13/85	MJC	6.5	260.00
Attend and note taking at preliminary injunction hearing.			
12/13/85	GLH	6.0	210.00
Assist in transporting files to Court. . . .			
12/14/85	RNB	3.7	166.50
Drafting arguments concerning preliminary injunction.			
12/15/85	WWP	11.0	935.00
Preparation for hearing.			
12/15/85	RNB	13.2	594.00
Revision of memorandum on preliminary injunction motion.			
12/16/85	WWP	9.0	765.00
Preparation for and attend hearing.			
12/16/85	RNB	8.5	382.50
Finished drafting memoranda concerning hearing. . . .			
12/16/85	MJC	8.0	320.00
Attending and note taking at preliminary injunction hearing.			
12/17/85	WWP	5.6	476.00
Organize files from hearing; outline memorandum, additional proposed findings and concerns; telephone conferences with Court; telephone conference with Mr. Clapp.			
12/19/85	WWP	8.0	680.00
Finish revising first section of memorandum, proposed findings and conclusions.			
12/19/85	RNB	10.6	477.00
Revise supplemental memorandum in support of Plaintiffs' Motion for Preliminary Injunction.			

12/19/85	MJC	7.1	284.00
Organize file, copy exhibits for filing with Court; index exhibits. . . .			
12/20/85	WWP	3.8	323.00
Tour landfill, file supplemental memorandum in support of Plaintiffs' Motion for Preliminary Injunction			
12/20/85	RNB	8.4	378.00
Draft third argument of discussion in supplemental memorandum. . . .			
12/20/85	MJC	7.1	254.00
Landfill inspection with Attorney Pearson, opposing counsel, and Magistrate; preparation for filing Proposed Findings and Conclusions; arrange for copying; organized documents for filing.			
01/02/86	WWP	4.8	408.00
Outline reply brief. . . .			
01/02/86	RNB	8.3	373.50
Preparation of reply brief.			
01/02/86	MJC	5.8	232.00
Analyze arguments opposing Defendant's Memorandum in Opposition to for [sic] Preliminary Injunction; organize file.			
01/03/86	WWP	4.0	340.00
. . . analyze reply memorandum; research City's preliminary injunction authority.			
01/03/86	RNB	8.8	396.00
Referencing reply memorandum.			
01/05/86	RNB	4.3	193.50
Draft of reply memorandum.			
01/06/86	WWP	6.0	510.00
Work on reply memorandum. . . .			

01/06/86	MJC	4.8	192.00
Send out bills for copying, analyze Plaintiffs' response to Defendant's objections to proposed facts . . . review Defendant's objections to proposed facts; draft memorandum rebutting objections.			
01/07/86	WWP	7.0	595.00
Reply memorandum.			
01/07/86	RNB	2.3	103.50
Review Defendant's objections to Plaintiff's Proposed Findings of Fact; other work concerning reply memorandum.			
01/07/86	MJC	3.2	128.00
. . . review draft Memorandum in Opposition to Defendant's Objection to Proposed Facts. . . .			
01/09/86	WWP	3.0	255.00
Preparation for preliminary injunction hearing.			
01/10/86	WWP	6.5	552.50
Preparation for and attend preliminary injunction hearing.			
01/10/86	RNB	8.0	360.00
Draft memorandum relating to preliminary injunction hearing; attend hearing.			
01/10/86	MJC	4.3	172.00
. . . attend final hearing on Motion for Preliminary Injunction.			
01/20/86	MJC	0.6	24.00
Draft and review outline of facts proposed and not objected to by City.			
01/27/86	WWP	1.8	153.00
Review proposed fact comparisons; review motion to compel.			

01/31/86	MJC	1.8	72.00
Telephone conference with Ernie Dague, Jr. regarding trespass on his property by City.			
02/21/86	WWP	1.0	85.00
Telephone conference with Attorney Bland about Magistrate's decision.			
02/21/86	RNB	3.3	148.50
Review and analysis of the Magistrate's Report and Recommendation . . . (relating to the Report and Recommendation)			
02/21/86	MJC	3.0	120.00
Telephone conference with Court regarding decision by Magistrate; review decision; telephone conferences with client regarding same.			
02/22/86	WWP	0.5	42.50
Telephone conference with Attorney Bland concerning objections to Magistrate's decision.			
02/23/86	RNB	2.3	
Initial draft of Plaintiffs' objections to Magistrate's Report and Recommendation.			
02/24/86	WWP	1.5	127.50
Review decision and analyze findings of fact.			
02/24/86	RNB	0.6	27.00
Conference with Attorney Pearson concerning report and recommendation.			
02/25/86	WWP	1.5	127.50
Analyze findings of fact and outline objections.			
02/26/86	WWP	1.0	85.00
Further review of findings of fact.			
02/27/86	WWP	1.5	127.50
Draft and edit outline for objections to Magistrate's decision.			

02/27/86	RNB	8.3	373.50
Analyze of findings of fact.			
02/28/86	WWP	1.0	85.00
Several telephone conferences with Mr. Bland about objections to Magistrate's decision.			
02/28/86	RNB	7.5	337.50
Revise arguments in Plaintiff's objections. . . .			
03/01/86	WWP	4.5	382.50
Organize and draft objections to Magistrate's ruling.			
03/02/86	WWP	8.0	680.00
Edit draft and research objections to Magistrate's decision.			
03/02/86	RNB	8.8	396.00
Referencing drafts of Plaintiff's objections.			
03/03/86	WWP	3.5	297.50
Analyze objections, edit final draft.			
03/03/86	RNB	11.9	535.50
Work re: objections to Magistrate's Report and Recommendations.			
03/03/86	JHT	6.8	
Conference with Attorney Bland regarding preparation of chronology based on findings of fact of Magistrate; review findings and development of chronological structure.			
03/03/86	MJC	7.0	280.00
Assist in drafting and revising objections to Magistrates's recommendations. . . .			
03/05/86	WWP	2.2	187.00
Revise proposed order.			
03/05/86	RNB	5.8	261.00
Thorough review of City and Third-Party Defendant G.E.'s objections to Magistrates Report and			

Recommendations; draft proposed order for preliminary injunction.

03/05/86	MJC	1.5	60.00
Revise memo regarding City's objections to Magistrate's recommendations.			
03/24/86	MJC	0.3	12.00
Telephone conference with client regarding excessive trash in yard from landfill; plan further work to be done.			
03/27/86	RNB	2.3	103.50
Thorough review and analysis of Judge Billings' opinion; telephone conference with Attorney Pearson to discuss Judge Billings' Opinion and grounds for an appeal therefore; legal research on procedures for the withdrawal of EPA authorization of a RCRA and the regulations promulgated thereunder; legal research on rules of appellate procedure for appealing an Order of the U.S. District Court.			
03/27/86	MJC	0.6	24.00
Intraoffice conference regarding Court's denial of Motion for Preliminary injunction; review and analyze Court Order.			
04/04/86	WWP	1.5	127.50
Review and analyze Judge Billings' decision and appeal options.			
04/04/86	RNB	2.4	108.00
Further analysis of Judge Billings' Opinion and arguments to be made on appeal; draft outline of hazardous waste permit arguments to be made on appeal.			
04/07/86	WWP	3.0	255.00
Outline and evaluate grounds for appeal; telephone conference with Court.			

04/15/86	RNB	1.3	85.50
Further analysis of standards for preliminary injunction, standard of review on appeal, and arguments to be raised on appeal.			
04/21/86	RNB	1.6	72.00
Analyze issues proposed to be raised on appeal and the procedure on appeal; draft notice of appeal.			
04/22/86	WWP	2.0	170.00
Outline and analyze appeal issues; review exhibit and transcript requirements on appeal.			
04/22/86	RNB	1.2	54.00
Further analysis of issues proposed to be raised on appeal; draft pre-argument statement.			
04/22/86	MJC	0.4	16.00
Telephone conference with Federal Court for list of exhibits; review and proofread notice of appeal documents.			
04/23/86	WWP	2.0	170.00
Lengthy review of procedures for Second Circuit Court of Appeals.			
04/23/86	MJC	0.3	12.00
Review exhibit list from Federal Court; Memorandum to Attorney Bland regarding same.			
04/24/86	RNB	0.8	36.00
Analyze procedure for docketing the appeal; telephone conference with Clerk of Federal District Court.			
04/28/86	RNB	0.5	22.50
Review procedure for admission to practice before the U.S. Court of Appeals for the Second Circuit.			

04/29/86	RNB	1.3	58.50
Further analysis of procedure on appeal; draft outline of procedure and deadlines on appeal.			
04/30/86	WWP	1.0	85.00
Final review of forms C and D, other appeal procedures and proper certification.			
04/30/86	RNB	1.5	67.50
Analyze need to file depositions of the generators so as to include them within the docket entries; review and analyze forms C and D and further legal research on procedures on appeal.			
04/30/86	MJC	0.6	24.00
Submittal of depositions to Federal Court for filing; telephone conference with Court Clerk regarding same.			
05/01/86	WWP	0.6	51.00
Final approval of appeal forms; service of same.			
05/01/86	RNB	0.5	22.50
Review of papers to be filed in the Court of appeals and in the U.S. District Court, and to be served on the other parties.			
05/04/86	MJC	0.3	12.00
Letter to Court Clerk regarding filing of depositions.			
05/05/86	RNB	2.8	126.00
Legal research under RCRA and the CWA in preparation for drafting appellant's brief.			
05-05-86	WWP	1.0	85.00
Read Second Circuit scheduling calendar; conference with Mr. Clapp; telephone conference with client.			
05-06-86	RNB	5.2	234.00
Continue legal research under RCRA and the CWA in preparation for drafting brief.			

05-07-86	WWP	1.0	85.00
Review appeal schedule of hearing dates and issues outline; review evidence of trash at Dague house; review photographs.			
05-07-86	RNB	7.3	328.50
Draft letters to Mr. Burbank and Attorney Clapp regarding consent to proceed before the Magistrate; telephone conference with Clerk of the U.S. District Court of Appeal for the Second Circuit regarding admission to practice before the Second Circuit; continue legal research of case law under RCRA and the CWA in preparation for drafting the brief.			
05-08-86	WWP	0.5	42.50
Review exhibit requirements.			
05-08-86	RNB	5.8	261.00
Draft first part of argument I of Appellants' brief.			
05-09-86	WWP	2.3	195.50
Review outline for brief; letter to Mr. Clapp regarding exhibits.			
05-09-86	RNB	6.3	283.50
Draft second and third parts of argument I of Appellants' brief.			
05-09-86	MJC	2.0	80.00
Review exhibits to be filed with appeals court; deliver notice of exhibits designated to Attorney Clapp.			
05-11-86	RNB	3.3	148.50
Draft argument II of appellants' brief.			
05-12-86	RNB	5.5	247.50
Thorough analysis of Weinberger case and draft argument III of the brief.			

05-13-86	WWP	4.5	352.50
Prepare for tomorrow's pre-argument conference			
05-13-86	RNB	5.2	234.00
Draft statement of the case and statement of the facts; revise arguments I, II, and III; preparation for pre-argument conference.			
05-14-86	WWP	9.00	765.00
Preparation for and attend conference at Second Circuit Court of Appeals.			
05-14-86	RNB	11.0	495.00
Preparation for and attend pre-argument conference at the U.S. Court of Appeals for the Second Circuit.			
05-15-86	WWP	0.3	25.50
Letter to the Court.			
05-15-86	RNB	0.3	13.50
Telephone conference with Clerk of the U.S. Court of Appeals for the Second Circuit regarding scheduling of argument.			
05-16-86	WWP	1.0	85.00
Review docket entries; telephone conference with Mr. Clapp; letter to Court.			
05-16-86	MJC	0.7	28.00
Analyze exhibits to be designated on appeal; deliver notice of same to opposite counsel.			
05-19-86	RNB	2.8	126.00
Compile appendix and table of contents of brief.			
05-20-86	WWP	5.2	442.00
Draft and edit brief; detailed analysis of necessary revisions to same.			
05-20-86	RNB	4.5	202.50
Telephone conference with Mr. Jarvis regarding depositions of third-party Defendants and			

Plaintiffs' exhibits; analyze issues in need of additional legal research and analyze issues raised on appeal; analysis of City of Gallatin case and the "Hazardous and Solid Waste Amendments of 1984."			
05-21-86	WWP	6.5	552.50
Draft and edit brief.			
05-21-86	RNB	10.8	486.00
Further analysis of issues raised on appeal; review procedural requirements for brief; revise brief.			
05-21-86	MJC	2.8	112.00
Send Judge billings' Opinion to Dr. Reed; assemble documents for Appendix to appellants' brief.			
05-22-86	WWP	5.0	425.00
Further edits to brief; further analysis of waste industries and other important cases; review case chart.			
05-22-86	RNB	8.3	373.50
Draft chart of case law for the appeal; draft checklist for the appeal; revise brief.			
05-22-86	MJC	4.0	160.00
Assemble and paginate appendix to Appellants' brief; review citations in brief for appendix.			
05-23-86	WWP	7.5	637.50
Extensive edit of brief; review filing form requirements.			
05-23-86	RNB	7.3	328.50
Further analysis and revise brief; draft certificate of service.			
05-23-86	JHT	2.2	99.00
Legal research regarding scope of discretion for injunctive relief.			

05-23-86	MJC	5.0	200
Preparation for appeal; file organization; site inspection and conference with clients regarding city's request to clean bank beside landfill; assist in preparing documents for appeal.			
05-25-86	WWP	4.5	382.50
Drafting and editing brief.			
05-26-86	WWP	10.0	850.00
Extensive drafting and editing of brief; analyze judicial discretion and legal research on same.			
05-26-86	MJC	7.7	308.00
Preparation for filing brief; appendix and addendum with Court of appeals; proofread brief; copy statutes for addendum.			
05-26-86	DL	7.0	210.00
Legal research on standards for issuance of preliminary injunction upon violation of federal environmental and other public interest legislation.			
05-27-86	WWP	2.5	212.50
Prepare brief for filing with Court of Appeals.			
05-27-86	MJC	6.8	272.00
Prepare brief, appendix and addendum for filing; telephone conference with printers regarding same; organize and complete printing, proofread and revise brief; assemble packages of documents for filing and service; telephone conference with Don Bessette regarding City's request to clear bank; memorandum regarding same.			
06-03-86	RNB	2.8	126.00
Preparation for oral argument; legal research on District Court's discretion to issue an injunction upon a finding of a statutory violation.			

06-05-86	MJC	1.6	64.00
Draft letter to City regarding cleanup of embankment.			
06-06-86	MJC	1.3	52.00
Review and edit letter to City regarding cleanup of embankment.			
06-08-86	WWP	2.5	212.50
Analyze procedures; review notice documents; outline argument and organize appeal notebook.			
06-11-86	WWP	4.0	340.00
Review and analyze City's brief; prepare notebook for argument.			
06-11-86	RNB	8.0	360.00
Thorough review and analysis of City's brief; conference with Attorney Pearson to discuss notebook for oral argument and to discuss City's brief; compile documents for notebook for oral argument; review and analyze memorandum regarding traditional and second circuit standards for preliminary injunction.			
06-11-86	MJC	2.4	96.00
Assist in preparing appeal notebook; telephone conference with appeals court regarding return of "extra" copies of appendix; review City's brief; organize file.			
06-12-86	WWP	2.0	170.00
Edit letter to City; verify documents to court and hearing date; review first draft of reply brief.			
06-13-86	WWP	2.4	204.00
Further analyze City's brief; telephone conferences with Mr. Sorrell; prepare for hearing; locate documents; review hearing binder; telephone conference with Mr. Wadhams.			

06-13-86	RNB	4.2	189.00
Legal research on abandonment or waiver of a claim on appeal; compile documents for note book for oral argument.			
06-15-86	WWP	3.5	297.50
Review legislative history for 1984 Amendments; review and analyze briefs.			
06-16-86	WWP	1.5	127.50
... further analysis of City's brief.			
06-16-89	RNB	1.5	67.50
Conference with Attorney Pearson regarding rescheduling of oral argument and discussion of "Hazardous and Solid Waste Amendments of 1954; further analysis of memorandum on statutory injunctions.			
06-17-89	WWP	1.5	127.50
Telephone conference with Court; telephone conference with Mr. Clapp; Motion and Affidavit to Court regarding oral argument date.			
06-17-89	RNB	1.8	81.00
Compile RCRA;s [sic] criteria for classification of sanitary landfills for notebook for oral argument.			
06-18-86	RNB	0.7	31.50
Revise reply brief.			
06-18-86	MJC	3.3	132.00
Conference with Don Bessette regarding signing of agreement with City to clean up bank; file maintenance; send briefs to clients; conference with Mr. Bessette regarding construction plan of his mother's property.			
06-19-86	WWP	2.4	204.00
... prepare for oral argument; review argument notebook.			

06-22-86	RNB	0.8	36.00
Discuss reply brief with Attorney Pearson			
06-23-86	WWP	2.5	212.50
Draft reply brief.			
06-23-86	RNB	3.5	157.50
Draft table of contents and table of cases and statutes for reply brief; thorough proofread of reply brief.			
06-23-86	MJC	3.0	120.00
Draft certificate of service and enclosure letter to Court for filing reply brief; proofread reply brief; organize copying and distribution of reply brief; deliver to Attorney Clapp; send copies of all briefs to clients.			
06-24-86	RNB	4.9	220.50
Draft statement of the case and outline of first argument for oral argument			
05-26-86	RNB	5.2	234.00
Draft second and third arguments for oral argument.			
07-01-86	RNB	1.5	97.50
Prepare for oral argument on appeal; review third-party Defendant's Memorandum in Opposition to City's Motion to Join Additional Defendants.			
08-06-86	RNB	2.4	156.00
Further preparation for oral argument; draft list of questions likely to be raised at oral argument; telephone conference with environmental task force.			
08-08-86	WWP	1.0	100.00
Prepare for oral argument.			
08-10-86	WWP	3.6	360.00
Prepare for oral argument.			

08-12-86	WWP	3.0	300.00
Prepare for oral argument.			
08-12-86	RNB	6.4	416.00
... preparation for oral argument.			
08-13-86	WWP	5.0	800.00
Prepare for tomorrow's argument; travel to New York city.			
08-13-86	RNB	8.5	552.50
Legal research on notice provisions of RCRA and the CWA; preparation for oral argument.			
08-14-86	WWP	8.0	800.00
Oral argument at Second Circuit.			
08-14-86	RNB	8.0	520.00
Further preparation for oral argument and attend oral argument.			
08-18-86	WWP	1.5	150.00
Review Second Circuit hearing and refile documents			
08-18-86	RNB	0.3	19.50
Telephone conference with Ernie Dague, Jr. regarding oral argument at Court of Appeals.			
08-20-86	WWP	1.0	100.00
Telephone conference with Court; review and analyze decision of Court of Appeals.			
08-21-86	WWP	5.0	500.00
Analyze all options for appeal			
08-21-86	RNB	1.5	97.50
Conference with Attorney Pearson to discuss decision and possible appeal from Second Circuit			
10-08-86	WWP	1.0	100.00
Analyze options in light of City's failure to respond to requests to admit.			

11-03-86	WWP	0.8	80.00
Review gas meter options			
11-03-86	MJC	2.4	96.00
... telephone conference with client regarding recalibration of gas meter			
11-10-86	MJC	1.0	40.00
... telephone conference with client regarding recalibration of gas meter; memorandum regarding same.			
11-17-86	WWP	0.6	60.00
... review gas meter calibration issue.			
11-24-86	MJC	0.8	32.00
Plan further work for Motion to Compel; file maintenance.			
05-12-87	MJC	0.4	16.00
Telephone conference with Don Bessette regarding proposed construction on mother's property; memorandum regarding same.			
05-18-87	MJC	0.8	32.00
Telephone conference with client regarding windblown trash problem; memorandum to attorney Pearson regarding same			
05-19-88	RNB	0.3	21.00
Assignments to legal assistant case regarding City's trespass on Ernie Dague, Sr.'s property			
05-19-88	MJC	0.5	22.50
Analysis of new fact issues regarding trespass by City			
08-26-88	RNB	1.3	91.00
Legal research on common law causes of action and defenses thereto in preparation for trial on pendant state claims.			

09-08-88	RNB	2.0	140.00
Legal research on compensation for paralegal hours and enhancement of attorney's fees			
02-03-89	WWP	2.2	275.00
. . . organize and evaluate water test results against new state ground water regulations.			
02-03-89	MJC	1.5	75.00
. . . review state groundwater regulations.			
02-06-89	RNB	2.3	184.00
Review and analysis of Vermont's groundwater protection rule and strategy			
02-06-89	MJC	1.0	50.00
Telephone conference with VANR regarding copy of current groundwater regulations and classification of state groundwater; report to Attorney Bland regarding same;			
02-07-89	MJC	5.5	275.00
Attend Lamoille County Regional Solid Waste District meeting in Morrisville to monitor City and State representations regarding City's landfill.			
02-08-89	MJC	0.6	30.00
Memorandum regarding Solid Waste District meeting and City and State statements regarding City's landfill.			
05-08-89	MJC	11.0	550.00
Preparation for and assistance at trial of federal claims in Rutland; telephone conference with firm librarian regarding documents needed as exhibits.			
05-09-89	MJC	11.5	575.00
Preparation for trial; assist at trial; mark admitted exhibits to be used at trial; telephone conference with firm librarian regarding maps of landfill and title search of landfill.			

10-19-89	ART	9.1	682.50
Legal research regarding attorney fees under RCRA and Clean Water and Air Acts.			
10-20-89	HB	3.1	372.00
Research regarding recovery of fees.			
10-20-89	RNB	2.5	200.00
Compile and analyze legal research on recovery of costs of litigation under RCRA and CWA; compile receipts for disbursements incurred; conference with Attorney Briggs regarding legal research on loadstar and multiplier; telephone conference with Dr. Frank Reed regarding Judge Billings' decision.			
10-20-89	ART	7.0	525.00
Continue legal research regarding awards of attorney fees under RCRA and Clean Water Act; shepardize cases.			
10-20-89	AJG	1.8	81.00
Continue review of files for disbursement receipts.			
10-22-89	ART	1.0	75.00
Legal research regarding attorney fees under RCRA and Clean Air Act; begin draft motion for fees.			
10-23-89	HB	2.8	336.00
Continue preparation of fee application and accompanying affidavits.			
10-23-89	ART	4.2	315.00
Continue draft motion for attorney fees and expenses.			
10-24-89	RNB	1.8	144.00
Continue review and proofread draft statement of services.			

10-25-89	GSC	2.4	216.00
Detailed line-by-line review of bill for legal services from 1985 to present; review standards for attorneys fees awards and enhancement criteria.			
10-25-89	RNB	0.8	64.00
Conference with accounting department regarding statement of services.			
10-25-89	ART	1.7	127.50
Revisions to Motion for Attorney Fees and supporting Memorandum.			
10-26-89	RNB	4.3	344.00
Extended telephone conference with Attorney Pearson regarding draft statement of services; telephone conference with Attorney Gallagher regarding same; legal research on requirements governing court-awarded attorney fees applications; follow-up telephone conference with Attorney Gallagher regarding same; revise Plaintiffs' application for award of fees and costs and supporting memorandum.			
10-26-89	ART	0.7	52.50
Legal research and analysis regarding contemporaneous time records requirement; telephone conference with accounting regarding bill.			
10-27-89	RNB	3.3	264.00
Analyze requirements for court-awarded attorney fees applications; conference with accounting department regarding hourly rates for services; continue to revise memorandum in support of Plaintiffs' application for award of fees and costs.			
10-28-89	RNB	4.3	344.00
Draft Affidavit in support of Plaintiffs' application for award of fees and costs; revise same; review receipts for expenses.			

10-29-89	RNB	3.8	304.00
Revise Affidavit in support of Plaintiffs' application for award of fees and costs; extended telephone conference with Attorney Pearson regarding revisions to memorandum in support of Plaintiffs' application for award of fees and costs; continue to revise memorandum in support of Plaintiffs' application for award of fees and costs.			
10-30-89	RNB	4.3	344.00
Telephone conference with Attorney Pearson regarding revisions to memorandum in support of Plaintiffs' application for award of fees and costs; follow-up telephone conference with Attorney Pearson regarding revisions to application and affidavit in support of Plaintiffs' application, for award of fees and costs; telephone conference with Attorney Mello regarding affidavit in support of Plaintiffs' application for award of fees and costs; telephone conference with Attorney Furlong regarding same; draft affidavits for Attorneys Mello and Furlong; telephone conference with Attorney Eggleston regarding affidavit in support of Plaintiffs' application for award of fees and costs; draft affidavit of Attorney Eggleston; thorough review and analysis of proposed attachment to Attorney Pearson's affidavit; edit Attorney Pearson's affidavit.			

68,591.00

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.	)	Civil Action No.
DAGUE, II, BETTY DAGUE and	)	85-269
ROSE A. BESSETTE)	
)	
v.)	
CITY OF BURLINGTON)	

PLAINTIFFS' REPLY IN SUPPORT OF AN
AWARD OF FEES AND COSTS

Defendant's supplemental memorandum opposing Plaintiffs' fee request raises nothing new, but once again rehashes the same mootness argument twice rejected by this Court. In *Environmental Defense Fund v. Lee M. Thomas, Administrator, U.S. Environmental Protection Agency*, 24 E.R.C. 1853 (D.D.C. 1986), the District Court for the District of Columbia granted the plaintiffs' motion for award of attorneys' fees and expenses incurred in an action to compel the U.S. EPA to issue final permitting standards for underground waste disposal tanks, as required by section 3004(w) or RCRA, 42 U.S.C. § 6924(w). The defendants opposed the award for a number of reasons, including: (1) EPA *conceded from the start* that the RCRA statutory deadline had not been met; and (2) the date set by the court for EPA to promulgate the permitting standards was not the date sought by plaintiffs. The Court held that the plaintiffs did *not* have to show that they received all relief requested in their complaint in order to prevail. The court cited *Hensley v.*

Eckerhart, 461 U.S. 424 (1983), which set forth standards generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party:

Plaintiffs may be considered prevailing parties for attorneys' fees purposes *if they succeed on any significant issue* in litigation which achieves some of the benefit the parties sought in bringing suit. 461 U.S. at 433 (emphasis added).

Even though this Court found the Defendant in significant violation of RCRA and the CWA, the Defendant continues to minimize and disparage its failure to comply with these federal environmental statutes. The Defendant continues to scoff at this Court's Orders dated March 26, 1986 and October 16, 1989, and federal law. This Court has already determined that Plaintiffs have "substantially prevailed" in this action therefore are entitled to their "costs of litigation, including reasonable attorney and expert witness fees." 42 U.S.C. § 6972(e) and 33 U.S.C. 1365(d). After four years of litigation, Plaintiffs' attorneys should receive promptly an award of their requested fees and costs.

Burlington, Vermont 31 December 1989

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland, Esq.
William W. Pearson, Esq.
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT COURT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.)	
DAGUE, II, BETTY DAGUE and	)	Civil Action No.
ROSE A. BESSETTE	)	85-269
)	
v.)	
CITY OF BURLINGTON)	

PETITION FOR ENFORCEMENT OF ORDER

By order dated 2 April 1990, this Court "ORDERED, ADJUDGED AND DECREED that plaintiff shall recover from the defendant the sum of \$198,027.50 for attorneys fees, plus necessary expenses in the amount of \$10,929.66, together with a 25% enhancement of the total attorneys fees in the amount of \$49,506.87 plus taxable costs."¹ The defendant has failed and refused to make prompt payment of these fees and expenses, despite a request for payment from plaintiffs' counsel.

Wherefore, plaintiffs request the Court to order defendant to pay them forthwith its interim award of attorneys fees and expenses in the amount of \$258,464.03, together with such other relief the Court deems just and proper.

¹ These fees and expenses were incurred from 5 April 1985 through 30 October 1989.

Burlington, Vermont. 16 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
William W. Pearson
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.)	
DAGUE, II, BETTY DAGUE and	)	Civil Action No.
ROSE A. BESSETTE	)	85-269
)	
v.)	
CITY OF BURLINGTON)	

CERTIFICATE OF SERVICE

On 16 April 1990, I served Plaintiffs' Petition for Enforcement of Order on Defendant by mailing true and correct copies of same via first class mail, postage prepaid, to Robert R. McKearin, Esq., Dinse Erdmann & Clapp, 209 Battery Street, P. O. Box 988, Burlington, VT

05402-0988 and Nancy G. Sheahan, Esq., McNeil Murray,
Inc., 271 South Union Street, Burlington, VT 05401.

Burlington, Vermont. 16 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.)	
DAGUE, II, BETTY DAGUE and	)	Civil Action No.
ROSE A. BESSETTE	)	85-269
)	
v.)	
CITY OF BURLINGTON)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
PETITION FOR ENFORCEMENT OF ORDER

Defendant City of Burlington opposes Plaintiffs' Petition for Enforcement of this Court's Order of April 2, 1990. Plaintiffs as petitioners, have requested that this Court order the City of Burlington to pay "forthwith" the award of attorney's fees and expenses totaling \$258,464.03. While characterized as an interim award in Plaintiffs' Petition, there is nothing in the Opinion and Order that would suggest that it is intended to be viewed as interim. Indeed, it appears to be the final order pertaining to the issue of attorney's fees. The claims left for resolution in this matter are to be tried to a jury and do not provide for an award of attorney's fees to a prevailing party.

Defendant's opposition to enforcement of the Order at this time is based primarily on the fact that the Order, for payment of more than a quarter of a million dollars to Plaintiffs' law firm, if enforced "forthwith" as Plaintiffs have requested, will impose a substantial burden on Defendant.

Furthermore, until judgment is entered, Defendant will not be able to challenge the award.

On the other hand, a delay of enforcement of the award pending entry of judgment (and pending resolution of the appeal) is appropriate inasmuch as there is no evidence that the Plaintiffs or their counsel will be prejudiced by such a delay of payment.

Accordingly, Defendant requests that the Plaintiffs' Petition for Enforcement of Order be denied.

Dated at Burlington, Vermont this 25th day of April, 1990.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.
Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L.)	
DAGUE, ADMINISTRATRIX OF)	
THE ESTATE OF ERNEST J.)	
DAGUE, II, BETTY DAGUE and	)	Civil Action No.
ROSE A. BESSETTE	)	85-269
)	
v.)	
CITY OF BURLINGTON)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S
OPPOSITION TO ENFORCEMENT OF COURT ORDER

Defendant opposes enforcement of this Court's Order of April 2, 1990 claiming that, if enforced "forthwith," it will impose a "substantial burden" on Defendant.¹ Defendant makes this claim even though it has maintained for the past five years in its Annual Reports to the public that *any* award of attorneys fees will be covered by insurance proceeds. (See attached.) While Plaintiffs appreciate Defendant's reluctance to pay the Court's award of attorneys fees and costs, they question why Defendant should say one thing to this Court and the opposite to the public.

In addition, this action has been pending for almost five years, during which period Plaintiffs' counsel have received no payment of their fees and expenses. This has imposed a "substantial burden" on them. Certainly the

¹ Defendant also claims that, even if the Court's Order is not enforced at this time, "the City's fiscal affairs will remain under the cloud of the Order awarding attorney's fees and costs."

Defendant does not want to pay the Court's award of fees and expenses *at any time*. Yet payment of the Court's award, however unpleasant, is the price to be paid for multiple violations of the federal environmental laws.

Burlington, Vermont. 30 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
William W. Pearson
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

City of Burlington,
Vermont
1986 Annual Report
July 1, 1985 - June 30, 1986

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1986

19. Commitments and contingencies:

A. *Landfill litigation* - The City has been named as defendant in a lawsuit concerning the operation of the Burlington Landfill. As mentioned in last year's report, the claimants contend that the City's operation of its landfill violated the Federal Resource Conservation Act

and the Clean Water Act. They contend that the City improperly received hazardous waste, and that polluting leachate and methane gas has been permitted to migrate from the landfill in violation of the statutes to the individual damage of the named plaintiffs and the general public. They also assert pendant state common law claims. They are seeking money damages, attorneys fees and a permanent injunction requiring the City to dig up and remove offending materials to another complying landfill site.

The City is defending this case vigorously. Plaintiffs' initial request for a preliminary injunction was denied after extensive hearing by the U.S. District Court. Plaintiffs appealed, but the denial was affirmed by the 2nd Circuit Court of Appeals. Discovery proceedings are now taking place. The other insurance carriers are proceeding on the basis of a "reservation of rights" which allows them to later contend that their insurance policies do not cover the claimed loss. It is the City's assessment that a reasonable probability exists that the individual plaintiffs will be awarded some monetary damages. The City does not believe such damages will be significant. The City believes that both any monetary damages assessed and any award of attorneys' fees will be covered by insurance proceeds. However, insurance proceeds are not likely to be available in the event that the court should order the injunctive relief plaintiffs are seeking.

The cost to the City of relocating dumped materials could be quite significant indeed. A figure in the millions of dollars would not be an excessive estimate in the City's view. Under any such circumstances, it would be a major financial exposure for the City and would undoubtedly

result in the need for an emergency loan or other borrowing to cover the cash. However, the City is reasonably confident that such drastic measures will not be ordered by the court.

B. *Sewer litigation* - The City is a defendant in another lawsuit in which plaintiffs are seeking \$1,000,000 in damages based on damages to real estate alleged to have occurred as a result of an overflow of a City sewer line. In addition, the plaintiffs are seeking \$500 per day in damages for the City's refusal to issue a certificate of occupancy for said real estate. The City is cautiously optimistic that it will prevail. Though the City's liability carrier has reserved its right to later assert a lack of coverage, the City believes that any judgment

* * *

City of
Burlington, Vermont
1987 Annual Report
July 1, 1986 -
June 30, 1987

* * *

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1987

19. Commitments and contingencies:

A. *Landfill litigation* - The City has been named as defendant in a lawsuit concerning the operation of the Burlington Landfill. As mentioned in last year's report, the claimants contend that the City's operation of its landfill violated the Federal Resource Conservation Act and the Clean Water Act. They contend that the City

improperly received hazardous waste, and that polluting leachate and methane gas has been permitted to migrate from the landfill in violation of the statutes to the individual damage of the named plaintiffs and the general public. They also assert pendant state common law claims. They are seeking money damages, attorney fees and a permanent injunction requiring the City to dig up and remove offending materials to another complying landfill site.

The City is defending this case vigorously. Plaintiffs' initial request for a preliminary injunction was denied after extensive hearing by the U.S. District Court. Plaintiffs appealed, but the denial was affirmed by the 2nd Circuit Court of Appeals. Discovery proceedings are now taking place. The other insurance carriers are proceeding on the basis of a "reservation of rights" which allows them to later contend that their insurance policies do not cover the claimed loss. It is the City's assessment that a reasonable probability exists that the individual plaintiffs will be awarded some monetary damages. The City does not believe such damages will be significant. The City believes that both any monetary damages assessed and any award of attorneys' fees will be covered by insurance proceeds. However, insurance proceeds are not likely to be available in the event that the court should order the injunctive relief plaintiffs are seeking.

The cost to the City of relocating dumped materials could be quite significant. A figure in the millions of dollars would not be an excessive estimate in the City's view. Under any such circumstances, it would be a major financial exposure for the City and would undoubtedly

result in the need for an emergency loan or other borrowing to cover the cash requirements. However, the City is reasonably confident that such drastic measures will not be ordered by the court.

B. *Other litigation* – The City is involved in various other litigations which the City believes are either without sufficient merit or substance to be likely to result in material, uninsured judgments or settlements.

C. *Electric Department* –

1. The Electric Department purchases power from Vermont Yankee pursuant to the provisions of a contract which entitles

* * *

City of
Burlington
Vermont

1989
Annual Report
July 1, 1988 –
June 30, 1989

* * *

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1989

19. Commitments and contingencies:

A. *Landfill Litigation* – The most significant law suit from the standpoint of municipal liability was the case entitled *Dague, et al. v. City of Burlington*. During the past fiscal year, the United States District Court did find that the City had committed certain violations of the Federal

Clean Water Act and the Resource, Conservation & Recovery Act through the operation of the Burlington landfill. The court determined that there was some possibility that leachate from the facility would make its way into the tributaries of the Winooski River and then to the river and Lake Champlain. Because the Court found that the City had taken and was taking the proper steps to close such facility in an environmentally responsible manner, it refused to order the payment of any civil fines by the City. Since the City was planning to close the facility as of January 1, 1990 in any event, the order did not severely prejudice the City.

There remains pending before the Court a request from the law firm which represented the plaintiff for legal fees to be paid by the City. The claim is in the amount of \$400,000. The City is most vigorously contesting both the entitlement to and the amount of the legal fees in question. The City is reasonably optimistic that either through Court order or as a result of the obligations of the insurance carrier that there will not be an obligation on the part of the City to pay the current amount in controversy from general city revenues.

B. *Landfill Contract* – On November 21, 1989, the City entered into an agreement to improve and operate a landfill in the town of Colchester, Vermont. This agreement is with Rathe, Inc., and includes a commitment by the City to construct an environmentally acceptable landfill. Work on this project was begun in November, 1989.

* * *

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,	:	
ERNEST DAGUE, JR., and	:	
BETTY DAGUE	:	Civil No.
	:	85-269
v.	:	
CITY OF BURLINGTON	:	

ORDER

On April 17, 1990, plaintiffs petitioned the court to enforce its previous order of April 2, 1990 which ordered the defendant to pay attorneys fees and necessary expenses. Defendant City of Burlington responded by moving for an entry of judgment of the April 2, 1990 order as well as the court's order of October 16, 1989.

In consideration of this matter, the court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for a delay in entering judgment on these orders. Specifically, the court finds that with the exception of Count V addressed in the October 16, 1989 order, the claims decided by the two orders are independent from the state claims which remain; thus, there is no fair reason to delay certification for appellate review.

The court finds, however, that the October 16, 1989 order did not finally adjudicate damages as to Count V; therefore it is inappropriate to enter judgment as to that count. See *International Controls Corp. v. Vesco*, 535 F.2d 742, 748 (1976) ("[A] judgment cannot be considered final

as long as it leaves open the question of additional damages."); *Hudson v. Chicago Teachers Union Local No. 1*, 708 F. Supp. 961, 962 (N.D. Ill. 1989).

The defendant's motion for an entry of judgment is GRANTED IN PART. The plaintiff's petition for enforcement is DENIED pending appeal. The court directs the clerk of court to enter judgment as to Counts I, II, III and IV of the court's Opinion and Order, dated October 16, 1989, and the Opinion and Order dated April 2, 1990.

SO ORDERED.

Dated at Rutland in the District of Vermont this 4th day of May, 1990.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR.,)	
ERNEST DAGUE, JR.,)	
BETTY DAGUE, and)	
ROSE A. BESSETTE,)	
Plaintiffs-Appellees,	)	Docket No. 90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

Counsel for Plaintiffs-Appellees respectfully submits, pursuant to Rule 39(c) of the Federal Rules of Appellate Procedure, the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the Defendant-Appellant and in favor of Plaintiffs-Appellees for insertion in the mandate.

Docketing Action

Cost of printing appendix (necessary copies ____)	N/A
Cost of printing brief (necessary copies <u>15</u>)	\$ 68.12
Cost of printing reply brief (necessary copies ____)	<u>N/A</u>
	\$ 68.12

VERIFICATION

STATE OF VERMONT

COUNTY OF CHITTENDEN, SS.

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this

action and that the services for which fees have been charged were actually and necessarily performed. A copy of hereof was this day mailed to Michael Clapp, Esq. Dinse, Erdmann & Clapp, P.O. Box 988, Burlington, Vermont, 05402 with postage fully prepaid.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR.,)	
ERNEST DAGUE, JR.,)	
BETTY DAGUE, and)	
ROSE A. BESSETTE,)	
Plaintiffs-Appellees,	)	Docket No. 90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant.)	

AFFIDAVIT

Heather Briggs, being duly sworn states as follows:

I am an attorney with Downs Rachlin & Martin, attorneys for the plaintiffs-appellees. The costs outlined in the Bill of Costs submitted herewith were necessarily incurred in connection with the appeal in this action. I make this affidavit to explain more fully the nature of the various items which appear on the Bill of Costs.

1. *Costs of Briefs and Appendices.* These costs were incurred for the copying and binding of appellees' brief, reply brief and appendices. Documents supporting this request are attached as Exhibit A. Plaintiff may recover these costs pursuant to Fed. R. App. P. 39(a). The sum of \$68.12 represents the actual cost of reproduction and binding, which sum is less than \$0.20 per page. Local Rule of the Second Circuit § 39; *Furman v. Cirrioto*, 782 F.2d 353 (2d Cir. 1986).

Burlington, Vermont. June 25, 1991.

DOWNS RACHLIN & MARTIN
Attorneys for Plaintiffs-Appellees

By: /s/ Heather Briggs
Heather Briggs

199 Main Street
P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Subscribed and sworn to before me this 25th day of
June, 1991.

/s/ Anita R. Tuttle
Notary Public

BILL OF COSTS

		) DISTRICT
United States District Court	)	Vermont
		) DOCKET NO.
Dague et al.	)	85-269
Plaintiffs)	
v.)	
City of Burlington	)	MAGISTRATE CASE NO.
Defendant)	

Judgment having been entered in the above entitled action on July 12, 1991 (date) against City of Burlington the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	\$ <u>130</u>
Fees for service of summons and complaint	<u>17.25</u>
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	<u>407.25</u>
Fees and disbursements for printing	<u>772.95</u>
Fees for witnesses (itemized on reverse side)	<u>279.24</u>
Fees for exemplification and copies of papers necessarily obtained for use in case	<u>845.80</u>
Docket fees under 28 U.S.C. § 1923	

Costs incident to taking of depositions 4,385.54

Costs as shown on Mandate of
Court of Appeals

Other costs (Please itemize)

TOTAL \$6,838.03

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories. Briefs should also be submitted supporting the necessity of the requested costs and citing cases supporting taxation of those costs.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed with postage fully prepaid thereon to: Michael Clapp, Esq., Dinse, Erdmann & Clapp, P.O. Box 988, Burlington, Vermont, 05402.

SIGNATURE OF ATTORNEY Heather Briggs

FOR: Ernest Dague, Sr. et al. DATE 6-25-91
Name of claiming party

) DATE AND TIME
 Please take notice that I will)
 appear before the clerk who will)
 tax said costs on the following)
 day and time:)

) AMOUNT TAXED
 Costs are hereby taxed in)
 the following amount and) \$
 included in the judgment:)

CLERK OF THE COURT (BY) DEPUTY CLERK DATE

**WITNESS FEES (computation,
cf. 28 U.S.C. 1821 for statutory fees)**

NAME AND RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Cost	Days	Cost	Miles	Cost	
Ruth Einstein, Montpelier, VT	1	30.00			15.00		45.00
Julie Hackbarth, Montpelier, VT	1	30.00			15.00		45.00
James Ogden, Burlington, VT	1	30.00			5.00		35.00

Thomas Moreau, Burlington, VT	1	30.00	5.00	35.00
Stephen Goodkind, Burlington, VT	1	30.00	3.00	33.00
William Rowley, Burlington, VT	1	30.00	13.12	43.12
Brian Hecken- berger, Montpelier, VT	1	30.00	13.12	43.12
			TOTAL	\$279.24

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6(e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"Entry of the judgment shall not be delayed for the taxing of costs."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,	)	Civil Action
and ROSE A. BESSETTE,	)	No. 85-269
)	
	)	Plaintiffs
)	
	)	v.
)	
CITY OF BURLINGTON,)	
)	
	)	Defendant

MEMORANDUM IN SUPPORT OF BILL OF COSTS

Plaintiffs submit this memorandum in support of the expenses claimed in the foregoing bill of costs. Fed. R. Civ. P. 54; Fed. R. App. P. 39; 28 U.S.C. § 1920; 42 U.S.C. § 6972(e); 33 U.S.C. § 1365 (prevailing party may be awarded costs of litigation).

1. Filing Fees.

Plaintiffs incurred \$125.00 in filing fees at the time they filed this complaint with the District Court. *Hohensee v. Basalyga*, 50 F.R.D. 230, aff'd 429 F.2d 982 (3rd Cir. 1969). Plaintiffs also incurred \$5.00 as the fee for filing the notice of appeal in 1986. The fee is authorized pursuant to Fed. R. App. P. 39(e). This fee is to be taxed in the District Courts as costs of the appeal in favor of the Plaintiffs as the prevailing parties. *Id.*

2. Witness Fees

Plaintiffs incurred \$279.24 in witness fees for attendance at the trial. Accordingly, all of these witnesses and the resulting fees were reasonably necessary to the case and are recoverable. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530 (5th Cir. 1984).

3. Fees for Exemplification and Copies of Paper Necessarily Obtained for Use in the Case.

Title 28 U.S.C. § 1920(4) authorizes a judge or clerk of any court of the United States to include as costs photocopies necessarily obtained for use in the case. Plaintiff seeks recovery here only of those copies furnished to the court or opposing counsel. Such costs were approved in *Beech Cinema v. 20th Century Fox Film Corporation*, 480 F.2d 1195, 1198 (S.D. N.Y. 1979), affirmed 622 F.2d 1106 (2d Cir. 1980). In *Beech Cinema*, the prevailing party originally sought recovery of travel expenses, meals and lodging, messenger service, secretarial overtime, long distance phone calls, and postage costs. The court disallowed the above expenses as not authorized under a bill of costs. Additionally, however, the plaintiff sought recovery for photocopy expenses. The court allowed recovery of the costs of those copies "furnished to the court or opposing counsel." *Beech Cinema*, 48 F. Supp. at 1198. See also *Tavarez v. Heckler*, 610 F. Supp. 1059, 1064 (S.D. New York 1985).

In the instant action, Plaintiffs have submitted only the expenses they incurred in providing copies and exhibits to the Court and opposing counsel. Copying has been charged at the Court's rate of 20 cents per page.

Based upon the foregoing authority, Plaintiffs respectfully submit that their requested photocopying costs, totalling \$845.80 are allowable and should be taxed.

4. Plaintiffs' Costs Incident to Taking Depositions.

Plaintiffs took the depositions of only the ten (10) individuals most directly involved in the events surrounding Defendant's management of the landfill, disposal at the landfill and the effects of the same. Specifically, these individuals were Steven Goodkind, Thomas Moreau, James Robear, Robert Dill, Laurence Bartlett, Frank Reed, Donald Stewart, William Countryman, Craig Heindel, Henry Hager, Swiatoslav Kaczmar and representatives of the Blodgett Co., Inc., the E.B. & A.C. Whiting Co., the Edlund Co., Inc. and General Electric. Most of these individuals testified at the trial. Plaintiffs respectfully submit that these depositions were crucial to Plaintiffs' case and costs incurred by Plaintiff to obtain copies of these depositions, totalling \$4,385.54 should be awarded.

In *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981), the expenses incurred in discovery depositions reasonably necessary to the case were held recoverable. In the instant case, Plaintiffs respectfully submit that the deposition testimony of each of the ten (10) deponents was essential to properly support the verdict in favor of Plaintiffs and, as in *Sangamo Construction Co.*, expenses incident to these depositions should be allowed.

WHEREFORE, Plaintiffs pray that costs totalling \$6,838.03 be taxed against Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

Fed. I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Fed. I.D. No. 000601319

B3/40.0617

Not reproduced are 85 pages of original documentation (invoices, receipts, etc.) of expenses and disbursements totalling \$6838.03, the amount of which is not disputed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,	)	Civil Action
and ROSE A. BESSETTE,	)	No. 85-269
)	
Plaintiffs	)	Appellate
	)	#90-7544
v.)	
	)	(Filed
CITY OF BURLINGTON,	)	6/25/91)
)	
Defendant)	

PLAINTIFFS' SUPPLEMENTAL APPLICATION
FOR AWARD OF FEES AND COSTS

Plaintiffs submit this application for their costs of litigation, including attorney fees and expenses, incurred in this action since October 31, 1989, excluding attorney fees and expenses relating to the appeal to the Second Circuit. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, provide that the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney and expert witness fees. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

On October 31, 1989, Plaintiffs submitted a fee application covering fees and expenses through that date, but *excluding* items properly includable on a bill of costs. On April 2, 1990, the district court ordered an interim award of \$247,534.37, including a 25% risk enhancement. An interlocutory appeal was filed by Defendant, followed by an affirmance by the Second Circuit on June 12, 1991. Plaintiffs now seek to recover fees incurred in this Court

since October 31, 1989, the date of their last fee application in this Court. In support of this application, Plaintiffs submit affidavits and other documentation to substantiate the requested fees and expenses.

WHEREFORE, Plaintiffs respectfully request that, based upon the attached affidavits of counsel, legal memorandum and other supporting documents, supplemental attorney fees in the amount of \$24,113.00 be awarded to Plaintiffs and that this amount be enhanced 25% (\$6,028.25) pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984) and this Court's order of April 2, 1990, for a total of \$30,141.25. Plaintiffs further request that the Court award \$2,707.61 for attorney expenses incurred in this matter since October 31, 1989 plus interest at the prevailing federal rate, 28 U.S.C. § 1961, from the date of judgment to the date of payment.

Burlington Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AZ 85702
(602) 622-3531

Federal I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Federal I.D. No. 000601319

B3/40.0617

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,	)	Civil Action
and ROSE A. BESSETTE,	)	No. 85-269
)	
Plaintiffs)	
)	
v.)	
CITY OF BURLINGTON,)	
)	
Defendant)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
SUPPLEMENTAL APPLICATION FOR AWARD
OF FEES AND COSTS

Plaintiffs submit this memorandum in support of their supplemental application for attorneys fees and expenses.

I. Statement of Facts

Plaintiffs Ernest Dague, Sr. Ernest Dague, Jr., Betty Dague and Rose A. Bessette brought this action against the City of Burlington, Vermont ("the City") for alleged violations of federal and state law arising out of the operation of the Burlington Municipal Disposal Grounds ("the Landfill"). Plaintiffs commenced this action under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under pendent state claims. Plaintiffs sought injunctive relief, imposition of civil penalties, compensatory and punitive damages for their pendent state claims, costs, and attorneys fees.

After a bench trial, the Court issued its Findings of Fact, Opinion and Order, finding Defendant liable on four of the five statutory counts of Plaintiffs' Complaint. Thereafter, "[h]aving determined that plaintiffs have substantially prevailed in both their RCRA and CWA claims," the district court assessed fees and expenses in the amount of \$247,534.37. The Defendant appealed and the Second Circuit affirmed the judgment of the District Court. Plaintiffs now move for a supplemental award for their attorney fees and expenses incurred in this court since October 31, 1989.

Since the date of Plaintiffs' last fee application, Defendant has moved for summary judgment, the District Court has awarded fees, and attempts were made to enforce that award, which ultimately resulted in the appeal to the Second Circuit by Defendant. Plaintiffs have been required by necessity to respond appropriately in

order to preserve the order of District Court. The result is that Plaintiffs' counsel have now prosecuted this action for almost six years without compensation. Plaintiffs submit that an interim order awarding payment of all fees and costs to date is appropriate.

II. Argument and Authority

The starting point for any calculation of attorneys fees is the "lodestar," the product of a reasonable hourly rate and the number of hours reasonably expended on substantive issues on which the petitioner satisfies the statutory threshold of success. *Sierra Club v. EPA*, 769 F.2d 796, 23 ERC 1001, 1002 (D.C. Cir. 1985); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). After the lodestar is calculated, a determination must be made as to whether any enhancement of the lodestar is appropriate. *Sierra Club*, 769 F.2d at 809-10.

A. Calculation of the Lodestar

This Court has already determined (and the Second Circuit has affirmed) that Plaintiffs have substantially prevailed on their federal claims, thereby entitling them to a fully compensatory fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). All that remains to be decided is whether the additional fees sought by Plaintiffs are based on "reasonable" rates and "reasonable" hours. "In computing the fee, counsel for [Plaintiffs as] prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136, 1147 (D.R.I.

1977) (analysis utilized in civil rights actions applicable to environmental cases) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976)).

Plaintiffs' attorneys have submitted two affidavits stating that their rates are those usually charged to clients who pay on an hourly basis, (Exhibits 1 and 2), as well as affidavits from other attorneys in Burlington, Vermont stating that the applicable rates for Downs Rachlin & Martin attorneys (and for Mr. Pearson, who is currently practicing in Tuscon, [sic] Arizona in the field of environmental law and whose current billing rate is \$170 per hour), are reasonable. (Exhibits 3, 4 and 5). *Blum v. Stenson*, 465 U.S. 886 (1989). Plaintiffs' application is further supported by itemized contemporaneous records for all time expended. (Exhibits 1 and 2). The descriptive entries show that all time spent was reasonably necessary.

Accordingly, Plaintiffs submit that the appropriate lodestar is \$24,113.00 in supplemental attorneys fees.

B. Enhancing the Lodestar

The next step to consider is whether an enhancement of the lodestar amount is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) ("*Delaware Valley II*"); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). An enhancement is appropriate here.

The purpose behind applying an enhancement or multiplier is to attract competent counsel. *SPIRG of New Jersey v. AT&T Bell Laboratories*, 842 F. 2d 1436, 27 ERC

1409, 1421 (3rd Cir. 1988); *Delaware Valley II*, 107 S.Ct. 3078 (1987). Simply stated, if plaintiffs' attorneys can receive as a *maximum* only the lodestar amount, after risking complete nonpayment as well as the hardships imposed by delay, lack of cash-flow, and out-of-pocket expenses, then competent counsel will be reluctant to serve on behalf of private attorneys general. The purpose underlying the "multiplier" is to balance the inherent inequities between plaintiffs and fee-paying defendants and to reward attorneys who take on public interest cases and achieve substantial results.

In this case, this Court has already determined that the enhancement of 25 percent (6,028.25) is appropriate, as affirmed by the Second Circuit. Accordingly, Plaintiffs request that the supplemental fees requested herein also be enhanced by the same amount, for a total fee award of \$30,141.25.

C. Expenses

In addition to attorneys fees, Plaintiffs request that they be awarded reasonable expenses not otherwise recoverable in a bills of costs,¹ incurred in this action. Plaintiffs' counsel has attached an affidavit setting forth that these expenses were necessary and reasonably incurred and has attached copies of applicable bills and receipts, totalling \$2,707.61. (Exhibits 1 and 2). Accordingly, Plaintiffs request that this amount also be awarded.

¹ Plaintiffs have submitted a separate Bill of Costs.

An award of costs in this case is not limited to those normally allowed pursuant to 28 U.S.C. § 1920 or F.R. Civ. P. 54. While there are few environmental cases on this point, case law developed under other fee-shifting statutes instructs that all reasonable out-of-pocket expenditures are to be awarded. *Shorter v. Valley Bank and Trust Co.*, 678 F.Supp. 714, 726 (N.D. Ill. 1988) (FLSA); *Reichman v. Bonsignore & Mazzotta*, 818 F.2d 278 (2d Cir. 1987) (citing *Laffey v. Northwest Airlines, Inc.*, 747 F.2d 4, 30 (D.C. Cir. 1984)); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988) (ADEA); *Kossman v. Calumet County*, 849 F.2d 1027, 1030 (7th Cir. 1988) (ADEA); *Hidle v. Geneva County Board of Education*, 681 F. Supp. 752, 758 (D.C. Ala. 1988); *Laffey*, 746 F.2d at 30; *Thompson v. Sawyer*, 586 F. Supp. 635, 643 (D.D.C. 1984) (Title VII); *Planells v. Howard University*, ___ F.Supp. ___, 34 FEP 66, 71 (D.C.D.C. 1984) (Title VII); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 289 (N.D. Ill. 1983) (ADEA).

Courts addressing claims under environmental protection statutes have stated that the general policies underlying awards of fees and expenses in civil rights cases apply to similar fee requests under environmental statutes. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 24 E.R.C. 1577 (1986) ("Delaware Valley I"); *SPIRG of New Jersey v. AT&T*, 842 F.2d 1436, 1439 n.1 (3rd Cir. 1988); *Save Our Sound Fisheries Association v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977).

Courts resolving fee issues under the Clean Air Act, 42 U.S.C. § 7607(f), a fee shifting statute substantially similar to the fee shifting provision in RCRA and the CWA, (*SPIRG of New Jersey*, 842 F.2d at 1439 n.1) have

awarded costs similar to those requested by Plaintiffs here. *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985) (awarding telephone, photocopying, postage costs); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6-8 (D.C. Cir. 1982) (travel, postage, copies of legislative history and transcript expenses awarded). All expenses requested by Plaintiffs are therefore reimbursable.

D. Interest

Plaintiffs further request an award of post judgment interest pursuant to 28 U.S.C. § 1961.

III. CONCLUSION

Plaintiffs respectfully request the Court to award supplemental attorneys fees in the amount of \$24,113.00, to enhance said fees 25% (for a total of \$30,141.25) to award \$2,707.61 for expenses, and post-judgment interest at the rate of 8.19% from October 17, 1989 to the date of payment by the Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

Federal I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Federal I.D. No. 000601319

Not reproduced are 13 pages of original documentation (invoices, receipts, etc.) of expenses and disbursements in each of exhibits 1 & 2 totalling \$2,707.61, the amount of which is not disputed.

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR.,)	
ERNEST DAGUE, JR., BETTY)	
DAGUE, and ROSE A. BESSETTE,)	
Plaintiffs,)	
)	
v.	)	Civil Action
CITY OF BURLINGTON,	)	No. 85-269
)	
Defendant.)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR SUPPLEMENTAL AWARD
OF FEES AND COSTS

STATE OF VERMONT)
CHITTENDEN COUNTY) SS.

Heather Briggs, being duly sworn, deposes and states as follows:

1.

I am an attorney in the law firm of Downs Rachlin & Martin, attorneys for Plaintiffs in this action. This affidavit provides the specification and itemization necessary for recovery of costs of litigation, including reasonable attorney fees and expenses, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2.

Attached hereto as Exhibit 1 are the billing statements by this law firm for legal services performed in this Court since October 31, 1989, exclusive of the appeal to the Second Circuit. These billings are accurate and true representations of work actually performed, compiled from time slips prepared by the attorney or legal assistant performing the work described. Time slips are prepared by each attorney and legal assistant on a daily basis and reflect actual time spent on the matter, as well as a description of the work performed. As shown in Exhibits 1 and 2, the total amount of Plaintiffs' attorneys fees

incurred from October 31, 1989 to May 7, 1990 is \$24,113.00.

3.

Attached are copies of the expense receipts incurred in this Court since October 31, 1989, exclusive of amounts relating to the appeal and of any amount to be included in Plaintiffs' Bill of Costs. These receipts are accurate and true representations of expenses actually incurred and total \$167.96. Certain other expenses were also necessarily incurred for which no receipts are available: (1) telephone \$101.82; (2) postage \$220.22; (3) travel \$38.10; (4) computer legal research \$617.11; and (5) copying \$850.20¹. These expenses total \$1,827.45. Thus, total expenses per Exhibits 1 and 2, not otherwise recoverable in a Bill of Costs, are \$2,707.61.

4.

William W. Pearson served as lead counsel for Plaintiffs in this matter. He was first admitted to the Indiana Bar and the U.S. District Court, Southern District of Indiana, in 1971; the Vermont Bar in 1975; the U.S. District Court, District of Vermont, in 1977; the U.S. Court of Appeals, Second Circuit, in 1986; the Arizona Bar and the U.S. District Court, District of Arizona, in 1989. He received his undergraduate degree from University of

¹ The practice of Downs Rachlin & Martin is to pass necessarily incurred litigation expenses on to fee-paying clients and not to increase hourly rates to absorb such expenses.

Chicago in 1968. He then attended Georgetown University Law Center where he received his J.D. in 1971. He is presently a member of the Arizona, Vermont and American Bar Associations.

Mr. Pearson is an experienced trial attorney in the field of environmental law. His experience with environmental legal problems includes hazardous waste management, toxic torts, NPDES permits, landfills, hazardous waste risk management and commercial lending, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

5.

Richard Bland assisted Mr. Pearson in this matter. Mr. Bland was first admitted to the Vermont Bar in 1985; the U.S. District Court, District of Vermont, in 1986; and the Supreme Court of the United States in 1989. Mr. Bland received his undergraduate degree from [sic] University of Vermont in 1982. He then attended Washington University School of Law where he received his J.D. in 1985. Mr. Bland is presently a member of the Chittenden County, Vermont and American Bar Associations.

Mr. Bland was, during his employment with this firm, a trial attorney whose practice was primarily in the field of environmental law. He has experience in resolving environmental legal problems involving hazardous waste management, including the generation, transportation, storage and disposal of hazardous waste, landfills, RCRA, CWA, Superfund, asbestos, underground storage tanks, hazardous waste risk management and commercial

lending, and insurance coverage for environmental claims.

6.

Based upon personal knowledge of hourly rates charged by other attorneys in the Burlington area with similar experience, reputation and skill, I know that rates from \$100 - \$175 per hour are routinely charged. As shown in Exhibit 1, there are varying levels of rates charged by the law firm of Downs Rachlin & Martin. Work performed by partners is billed at \$100 - \$175 per hour. Work performed by associates is billed at \$65 - \$110 per hour, depending on the level of experience. The following is a list of each attorney and legal assistant who worked on this case, the amount of time they spent on this case, and their hourly rates:

Heather Briggs	0.50	HOURS	AT	130.00/HR	=	65.00
Heather Briggs	4.50	HOURS	AT	120.00/HR	=	540.00
Richard N. Bland	30.10	HOURS	AT	90.00/HR	=	2,709.00
Richard N. Bland	84.80	HOURS	AT	80.00/HR	=	6,784.00
Anita R. Tuttle	8.20	HOURS	AT	75.00/HR	=	615.00
Michael J. Case	2.00	HOURS	AT	55.00/HR	=	110.00
Michael J. Case	2.30	HOURS	AT	50.00/HR	=	115.00

7.

In order to substantiate that the requested hourly rates are reasonable, attached are Exhibits 3, 4 and 5 which are affidavits from attorneys in the Burlington area which set forth their respective billing rates and further indicate the hourly rates for counsel with similar experience, reputation and skill.

8.

The environmental practice at Downs Rachlin & Martin has been limited to representing fee-paying clients, because of the risk associated with the representation of private attorneys general and plaintiffs on a contingency fee basis. Thus, most of the hours spent on this matter would have been spent representing other clients who would pay our hourly rates on a monthly basis.

Nevertheless, all work associated with Defendant's statutory liability was taken on a contingent basis: had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims. In fact, to date, this firm has not received any payment for its services.

An important factor in this firm's decision to pursue Plaintiffs' statutory claims was the opportunity to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount. This incentive, in my professional opinion, is necessary to attract competent counsel to represent private attorneys general in public interest litigation. Accordingly, I am of the opinion that Plaintiffs would have faced extreme difficulties in finding

other local counsel of similar experience to pursue their claims under RCRA and the CWA on an hourly rate to be paid only on the contingency of success.

June 25, 1991 /s/ Heather Briggs
Date Heather Briggs

Sworn to and subscribed before me this 25th day of June, 1991.

/s/ Anita R. Tuttle
Notary Public
Commission Expires: 2/10/95

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

June 24, 1991

MRS. ERNEST DAGUE
272 MANHATTAN DRIVE
BURLINGTON, VT 05401

FILE NUMBER: 23690001

DRAFT NUMBER: 1.002

FOR THE PERIOD THROUGH May 6, 1990

DAGUE V. CITY OF BURLINGTON

Sample Entry -

Date:	Atty:	Hours:	Amount:
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Description of Services:

10/31/89	RNB	12.30	984.00
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LETTER TO ATTORNEY PEARSON REGARDING HIS AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; DRAFT LETTER TO ATTORNEYS CLAPP AND MCNEIL REGARDING PLAINTIFFS' SETTLEMENT DEMAND; LETTER TO MR. BURBANK REGARDING FILING AND SERVICE OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS, SUPPORTING MEMO, AFFIDAVITS AND EXHIBITS; TELEPHONE CONFERENCE WITH ACCOUNTING DEPT. REGARDING REVISIONS TO STATEMENT OF SERVICES; REVIEW ATTORNEY EXPENSES AND COMPILE RECEIPTS THEREFORE; PROOFREAD PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS, SUPPORTING MEMORANDUM AND AFFIDAVITS AND EXHIBITS; TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME; SERVICE AND FILING OF SAME.

10/31/89	ART	6.30	472.50
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LEGAL RESEARCH REGARDING EXPENSES TO BE APPLIED FOR IN BILL OF COSTS; REVIEW EXPENSES.

10/31/89	MJC	0.50	25.00
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REVIEW DISBURSEMENT RECORDS AND TIMESHEETS FOR RECOVERY OF LEGAL FEES.

11/01/89	ART	0.80	60.00
ORGANIZATION OF BILL OF COSTS SUPPORTING DOCUMENTS AND OUTLINE.			
11/03/89	MJC	0.40	20.00
REVIEW MOTION FOR ATTORNEYS FEES AND ASSOCIATED DOCUMENTS.			
11/08/89	RNB	.30	24.00
LEGAL RESEARCH ON DISPLACEMENT OF CITIZEN SUITS UNDER RCRA BY FEDERALLY AUTHORIZED STATE PROGRAMS.			
11/11/89	RNB	2.30	184.00
FURTHER LEGAL RESEARCH ON EXCEPTIONS TO 60-90 DAY NOTICE AS A CONDITION PRECEDENT TO COMMENCING A CITIZEN SUIT UNDER THE CWA AND RCRA; LEGAL RESEARCH ON TOXIC POLLUTANT EFFLUENT STANDARDS AND PROHIBITIONS UNDER SECTION 1317(A) OF THE CWA.			
11/14/89	RNB	12.50	1,000.00
REVIEW DEFENDANT'S NOTICE OF APPEAL AND ANALYZE ITS MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; REVIEW AND ANALYZE FEDERAL RULES OF APPELLATE PROCEDURE, 28 U.S.C. §§ 1291, 1292, AND APPEALS TO THE SECOND CIRCUIT (6TH EDITION); EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND CROSS-APPEALABLE ISSUES; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING VOLUNTARY DISMISSAL OF APPEAL OF INTERLOCUTORY DECISION OF JUDGE BILLINGS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SAME AND SETTLEMENT POSSIBILITIES;			

FOLLOW-UP ATTORNEY PEARSON REGARDING SAME; ATTEND EMERGENCY MEETING OF CITY BOARD OF ALDERMEN REGARDING LANDFILL CRISIS.

11/14/89	ART	0.50	37.50
REVIEW OPPOSITION MEMO TO PLAINTIFF'S REQUEST FOR FEES; ANALYZE APPEAL AND FINALITY ISSUES.			
11/15/89	RNB	3.30	264.00
FURTHER REVIEW AND ANALYSIS OF CITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSS [sic]; REVIEW AND ANALYZE STIPULATION OF DISMISSAL OF APPEAL; LEGAL RESEARCH ON ENHANCEMENT OF ATTORNEYS' FEES UNDER FEE-SHIFTING STATUTES.			
11/15/89	ART	0.60	45.00
ANALYSIS OF RESPONSE TO MEMO IN OPPOSITION.			
11/20/89	HB	2.50	300.00
RESEARCH AND PREPARATION OF REPLY BRIEF REGARDING FEE APPLICATION.			
11/20/89	RNB	6.80	544.00
THOROUGH REVIEW AND ANALYSIS OF HAUSTROM V. TILLAMOOK COUNTY DECISION; ANALYZE ARGUMENTS AND CASE-LAW IN REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; BEGIN DRAFTING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF FEES AND COSTS, INCLUDING FIRST ARGUMENT THAT PLAINTIFFS HAVE SUBSTANTIALLY			

PREVAILED, ENTITLING THEM TO A FULLY COMPENSATORY FEE AWARD.

11/21/89	HB	2.00	240.00
REVISIONS TO REPLY BRIEF CONCERNING FEE APPLICATION.			
11/21/89	RNB	6.30	504.00
FURTHER LEGAL RESEARCH ON STATUTORY FEE AWARDS; CONTINUE DRAFTING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR FEES AND COSTS, INCLUDING ARGUMENTS THAT DEFENDANT'S GENERALIZED OPPOSITION IS INSUFFICIENT TO REDUCE THE LODESTAR AND THE LODESTAR REQUESTED SHOULD BE ENHANCED; REVISE SAME.			
11/22/89	RNB	1.50	120.00
LETTER TO ATTORNEY MCKEARIN; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF FEES AND COSTS; PROOFREAD, SERVICE AND FILING OF SAME; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS.			
11/29/89	RNB	0.50	40.00
REVIEW AND ANALYZE MINUTES OF 14 NOVEMBER 1989 EMERGENCY MEETING OF CITY'S BOARD OF ALDERMEN.			
12/04/89	RNB	2.70	216.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY WILLIAM PEARSON REGARDING HEARING ON PLAINTIFFS'			

APPLICATION FOR AWARD OF FEES AND COSTS AND ARGUMENT IN RESPONSE TO CITY'S OPPOSITION THERETO; ATTEND HEARING ON CITY'S MOTION TO DISMISS IN STATE OF VERMONT V. CITY OF BURLINGTON PENDING IN CHITTENDEN SUPERIOR COURT.

12/07/89	RNB	0.30	24.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON IN FURTHER PREPARATION FOR HEARING ON PLAINTIFFS' APPLICATION FOR AN AWARD OF FEES AND COSTS.			
12/07/89	MJC	1.00	50.00
TELEPHONE CONFERENCE WITH DON BESSETTE AND ROSE BESSETTE REGARDING STATUS OF CASE.			
12/08/89	RNB	1.30	104.00
FURTHER PREPARATION FOR HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND ARGUMENT FOR ENHANCEMENT OF FEES.			
12/10/89	RNB	4.80	384.00
REVIEW AND ANALYZE CASELAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS AND PREPARE ORAL ARGUMENT FOR HEARING ON SAME.			
12/11/89	RNB	10.30	824.00
FURTHER LEGAL RESEARCH ON FEDERAL COURT AWARDS OF ATTORNEY'S FEES; FURTHER PREPARATION FOR AND ATTEND HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; THOROUGH REVIEW AND ANALYSIS OF CITY'S			

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES; REVIEW CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE DATED 11 DECEMBER 1989; THOROUGH REVIEW AND ANALYSIS OF DEFENDANT'S MOTION FOR JUDGMENT AND/OR SUMMARY JUDGMENT AND/OR DISMISSAL OF COUNTS I - V OF PLAINTIFFS' COMPLAINT; FURTHER REVIEW AND ANALYSIS OF HAUSTROM V. TILLAMOOK COUNTY.

12/12/89	RNB	3.70	296.00
DRAFT PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; REVIEW AND ANALYZE 9TH CIRCUIT COURT OF APPEALS DECISION IN HAUSTROM V. TILLAMOOK COUNTY.			
12/13/89	MJC	0.40	20.00
TELEPHONE CONFERENCE WITH DON BESSETTE AND LETTER TO BESSETTE.			
12/14/89	RNB	1.50	120.00
FURTHER ANALYSIS OF DEFENDANT'S MOTION FOR DISMISSAL AND U.S. SUPREME COURT DECISION IN HAUSTROM V. TILLAMOOK.			
12/15/89	RNB	4.30	344.00
BEGIN DRAFTING MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I, II, III AND IV OF PLAINTIFFS' COMPLAINT; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.			
12/17/89	RNB	4.30	344.00
CONTINUE DRAFTING MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION			

FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I - IV OF PLAINTIFF'S COMPLAINT.

12/19/89	RNB	3.30	264.00
LETTER TO ATTORNEY PEARSON REGARDING DRAFT MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I - IV OF PLAINTIFFS' COMPLAINT AND DRAFT OF PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; ATTEND HEARING AT CHITTENDEN SUPERIOR COURT ON STATE'S MOTION FOR PRELIMINARY INJUNCTION IN STATE OF VT. V. CITY OF BURLINGTON; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND DRAFT RESPONSE MEMORANDA.			
12/23/89	JCG	0.30	37.50
LEGAL RESEARCH APPLICATION OF "LAW OF THE CASE" DOCTRINE; INTRAOFFICE MEMORANDUM TO ATTORNEY BLAND.			
12/27/89	RNB	1.30	104.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS AND PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I - IV OF PLAINTIFFS' COMPLAINT, AND SERVICE AND FILING OF SAME; REVISE AND PROOF-READ SAME.			
12/28/89	RNB	1.20	96.00
LETTER TO CLERK OF COURT REGARDING FILING OF MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT			

AND/OR DISMISSAL OF COUNTS I-IV OF PLAINTIFFS' COMPLAINT AND PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; LEGAL RESEARCH ON LAW-OF-CASE DOCTRINE; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ARGUMENTS AGAINST DISMISSAL OF COUNTS II AND IV OF PLAINTIFFS' COMPLAINT.

01/10/90	RNB	1.30	117.00
REVIEW AND ANALYZE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION DATED DECEMBER 11, 1989; LETTER TO ATTORNEY PEARSON REGARDING SAME.			
03/01/90	RNB	0.50	45.00
TELEPHONE CONFERENCE WITH MRS. BETTY DAGUE REGARDING PENDING MOTION FOR DISMISSAL AND APPLICATION FEES, AND JURY TRIAL ON PENDING STATE CLAIMS; REVIEW CITY'S 1989 ANNUAL REPORT REGARDING LANDFILL LITIGATION; LETTER TO ATTORNEY PEARSON REGARDING SAME.			
03/16/90	RNB	2.50	225.00
THOROUGH REVIEW AND ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER ON CITY'S MOTION FOR DISMISSAL; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; BRIEF TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME.			
03/19/90	RNB	0.50	45.00
FURTHER ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER ON CITY'S MOTION			

FOR DISMISSAL AND ANALYZE SETTLEMENT STRATEGY.

04/03/90	RNB	1.00	90.00
EXTENSIVE ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER REGARDING ATTORNEYS FEES AND EXPENSES; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.			
04/04/90	HB	0.50	65.00
CONFERENCE WITH RICHARD BLAND AND RESEARCH REGARDING ENFORCEMENT OF INTERIM FEE AWARD.			
04/06/90	RNB	0.60	54.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING JUDGE BILLINGS' OPINION AND ORDER DATED 2 APRIL 1990; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S INTENT TO ABIDE BY THE ORDER AND MAKE PAYMENT OF THE FEE AWARD.			
04/07/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S TENTATIVE DECISION NOT TO PAY THE FEE AWARD OF JUDGE BILLINGS' 2 APRIL 1990 OPINION AND ORDER.			
04/10/90	RNB	0.30	27.00
LETTER TO ATTORNEY MCKEARIN REGARDING CITY'S INTENT TO PAY AWARD OF FEES AND COSTS.			
04/11/90	RNB	2.50	225.00
REVIEW ATTORNEY MCKEARIN'S 10 APRIL 1990 LETTER REGARDING CITY'S INTENT TO MAKE PAYMENT OF COURT-AWARDED FEES AND EXPENSES; TELEPHONE CONFERENCE			

WITH ATTORNEY PEARSON REGARDING SAME; LEGAL RESEARCH ON APPEALS FROM INTERLOCUTORY DECISIONS UNDER 28 USC § 1292(B) AND F.R.A.P. 5.

04/13/90	RNB	0.70	63.00
DRAFT PETITION FOR ENFORCEMENT OF ORDER OF ATTORNEYS FEES AND EXPENSES; LETTER TO ATTORNEY PEARSON REGARDING SAME.			
04/16/90	RNB	0.80	72.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DRAFT PETITION FOR ENFORCEMENT OF ORDER; REVISE SAME; SERVICE AND FILING OF SAME.			
04/17/90	RNB	0.60	54.00
TELEPHONE CONFERENCE WITH MRS. BETTY DAGUE REGARDING STATUS OF COURT'S AWARD OF FEES AND EXPENSES AND HER AVAILABILITY FOR JURY TRIAL ON PENDANT STATE CLAIMS; CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING FEES AND EXPENSES INCURRED FROM 31 OCTOBER 1989 TO DATE.			
04/19/90	RNB	1.30	117.00
REVIEW AND ANALYZE ATTORNEY MCKEARIN'S 17 APRIL 1990 LETTER REGARDING DR. KACZMAR'S BILL; ANALYZE CITY'S DISCOVERY RESPONSES REGARDING INSURANCE COVERAGE; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING PARTY RESPONSIBLE FOR PAYMENT OF DR. KACZMAR'S BILL.			

04/19/90	MJC	2.00	110.00
LOCATE FILE DOCUMENTS REGARDING SETTLEMENT OFFERS, INSURANCE COVERAGE FOR CITY OF BURLINGTON; CONFERENCE WITH ATTORNEY BLAND REGARDING SAME.			
04/20/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S REQUEST FOR PAYMENT OF DR. KACZMAR'S BILL AND PNF HEARING ON PETITION FOR ENFORCEMENT OF ORDER.			
04/26/90	RNB	11.30	1,017.00
THOROUGH REVIEW AND ANALYSIS OF CITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PETITION FOR ENFORCEMENT OF ORDER, MOTION FOR ENTRY OF JUDGMENT AND SUPPORTING MEMORANDUM OF LAW; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; EXTENSIVE LEGAL RESEARCH REGARDING ENTRY OF PARTIAL JUDGMENT UNDER F.R.C.P. 54(b).			
04/27/90	RNB	2.30	207.00
DRAFT MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT; REVISE SAME.			
04/30/90	RNB	3.30	297.00
LEGAL RESEARCH ON STAY UPON APPEAL AND STAY OF JUDGMENT AS TO MULTIPLE CLAIMS; DRAFT PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO ENFORCEMENT OF COURT ORDER; REVISE SAME; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.			

Heather Briggs	0.50	HOURS	AT	130.00/HR	
				=	65.00
Heather Briggs	4.50	HOURS	AT	120.00/HR	
				=	540.00
Richard N. Bland	30.10	HOURS	AT	90.00/HR	
				=	2,709.00
Richard N. Bland	84.80	HOURS	AT	80.00/HR	
				=	6,784.00
Anita R. Tuttle	8.20	HOURS	AT	75.00/HR	
				=	615.00
Michael J. Case	2.00	HOURS	AT	55.00/HR	
				=	110.00
Michael J. Case	2.30	HOURS	AT	50.00/HR	
				=	115.00
<hr/>					
TOTAL SERVICES RENDERED					\$ 10,938.00
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EXHIBIT 2UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,	)	Civil Action
and ROSE A. BESSETTE,	)	No. 85-269
)	
Plaintiffs)	
)	
v.)	
)	
CITY OF BURLINGTON,)	
)	
Defendant)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
SUPPLEMENTAL APPLICATION FOR AWARD
OF FEES AND COSTS

STATE OF ARIZONA)
) AFFIDAVIT
COUNTY OF PIMA -)

William W. Pearson, being duly sworn, deposes and states as follows:

1. From the beginning of this action until May 30, 1989, I was a partner in the law firm of Downs, Rachlin & Martin, attorneys for plaintiffs in this action. Since June 1, 1989, I have been with the firm of Molloy, Jones & Donohue [sic] in Tucson, Arizona. This affidavit provides additional support for plaintiffs' application for the award of fees and costs on appeal pursuant to this Court's Order of June 12, 1991, and 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2. My relevant background is as follows:

- a. B.A. degree from University of Chicago in 1968
- b. J.D. degree from Georgetown University Law Center in 1971
- c. Admitted to Indiana Bar and U.S. District Court, Southern District of Indiana in 1971
- d. Admitted to Vermont Bar in 1975 and the U.S. District Court, District of Vermont in 1977
- e. Admitted to U.S. Court of Appeals, 2nd Circuit in 1986
- f. Admitted to Arizona Bar and U.S. District Court, District of Arizona in 1989.

3. I am an experienced trial attorney in the field of environmental law. I have handled a variety of environmental legal problems including hazardous and solid waste management, toxic torts, NPDES permits, landfills, lender liability for environmental hazards, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

4. In practicing environmental law in Vermont, it is my experience that a very high percentage of fee paying clients retain big city, national law firms to do their high stakes, sophisticated environmental work. For example, Downs, Rachlin & Martin is one of only a couple Vermont law firms who are lead counsel for a significant party in Vermont's Superfund sites. The other significant parties are represented by law firms from such places as Boston, New York City, and Washington, D.C. These outside Vermont firms are hired because the laws are complex, the technical issues sophisticated and the financial stakes are high. Commensurate with their experience and expertise, these out-of-state firms charge hourly fees substantially higher than their Vermont counterparts.

5. Presently, I am responsible for the environmental practice in Molloy, Jones & Donahue, which is one of the premier law firms in Tucson, Arizona, a city whose population is greater than all of Vermont. I am continuing my environmental law practice in the areas outlined above. My present hourly rate is \$170.00 per hour.

6. Attached to this Affidavit is an account of legal services provided by me in this action from October 31,

1989 to May 6, 1990. During this time, I kept contemporaneous records of the date and time spent working on this case. I also made contemporaneous description entries for the work done.

7. I have reviewed the attachments to Exhibits 1 and 2. To the best of my knowledge, Exhibits 1 and 2 are fair and accurate itemizations of the legal services and costs related to this action for the time period stated herein, including necessary costs to Vermont to argue Plaintiff's first application for fees.

8. Concerning the plaintiffs' application for an enhancement of the fees as stated, it is my considered judgment that the plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself based on the following:

- a. The plaintiffs had no funds with which to pay for legal services on an up-front basis;
- b. At the time this suit was brought Attorney Bland and I were among a handful of Vermont lawyers sufficiently sophisticated in this specialized area to handle plaintiffs' claims;
- c. Defendant is a political subdivision which does not function or have priorities like a private sector party thereby increasing the uncertainty of a strategy and outcome;
- d. The enormous up-front expense in this case of services and costs incurred would be prohibitive to all but larger law firms.

9. In summary, in my professional judgment, the total lodestar and enhancement requested are reasonable

and appropriate given all the factors listed in the Application itself and in this affidavit.

/s/ William W. Pearson
William W. Pearson

SUBSCRIBED AND SWORN TO before me this 21 day of June, 1991, by William W. Pearson.

/s/ Jeff Thompson
Notary Public

My Commission Expires:
My Commission Expires November 11, 1994
B3:40:0617

BILLING STATEMENT OF
WILLIAM W. PEARSON, ESQ.
TUCSON, ARIZONA

June 25, 1991

Mr. Ernie Dague, Sr.
Estate of Ernie Dague, Jr.
Mrs. Betty Dague
Ms. Rose Bessette
Manhattan Drive
Burlington, Vermont 05401 -

File Number: 2369-0001

For Period: October 31, 1989 to May 7, 1990

Matter: Dague v. City of Burlington

Sample Entry -

Date:	Hours:	Amount:
Description of Services:		

10/31/89	6.3	1071.00
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Analyze WWP affidavit in support of plaintiff's application for award of fees and costs; review draft motion and memorandum plus attachments; analyze and edit demand letter to city

11/7/89	1.0	170.00
---------	-----	--------

Outline issues which city likely to appeal with focus on notice requirements under RCRA (no notice, 60 day notice and 90 day notice), CWA 60 day notice and adequacy of notice under regulation requirements;

11/9/89	1.8	306.00
---------	-----	--------

Analyze strategy options for city: will stay be automatic, will attorney fees issue be split off, will city file declaratory judgment action, will pendent state claims have to be tried first before attorney fees paid and will city challenge court's award of fees without specific hearing on "substantially prevail" standard

11/14/89	5.4	918.00
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Read City's Notice of Appeal and Memorandum in Opposition to Plaintiff's Application for Award of Fees and Costs; 2 extended telephone conferences with attorney Bland about the merits of City's appeal, the proper appeal procedure and the possibility of settlement; analyze the merits of a cross appeal on Count I; review Rule 3(a) of the federal rules of appellate procedure, U.S.C. 1291 and 1292 and F.R.C.P. 54(b) as they apply to the City's appeal; read *Hewitt v. Helms* and *Rhodes v. Stewart* on proper standard for an award of attorney fees

11/16/89	3.2	544.00	Obtain and read <i>Hallstrom v. Tillamook</i> decided by the U.S. Supreme Court on November 7, 1989; compare with 9th Circuit decision; analyze impact of decision on multiple notice issues in this case;
11/21/89	3.0	510.00	Outline issues to be addressed in plaintiffs' reply memorandum: plaintiff prevailed on merits, lodestar calculations were appropriate and a fee enhancement is appropriate; review standards set out in <i>Pennsylvania v. Delaware Valley</i> for fee enhancement; read <i>U.S.F.L. v. N.F.L.</i> on fee award determination; reanalyze application of these two cases to plaintiffs' fee application
11/22/89	1.5	255.00	Final edit of plaintiffs' reply memorandum; two phone conferences with attorney Bland on final edits; outline strategy for oral argument; review recent state efforts to force city to relocate landfill
12/04/89	0.5	85.00	phone conference with attorney Bland on fee application and state v city hearing
12/07/89	0.3	51.00	phone conference with attorney Bland
12/09/89	9.5	1615.00	Collect relevant case law, applicable memos and notes for fees hearing to be held on 12/11/89 in Rutland, Vermont; travel to Burlington, Vermont
12/10/89	6.0	1020.00	Prepare for tomorrow's hearing: review all primary case law, read all memoranda filed on fee award with supporting documents and reread

			<i>Hallstrom v Tillamook</i> in anticipation of it being raised in tomorrow's hearing; phone conference with attorney Bland
12/11/89	9.5	1615.00	Travel to Rutland, Vermont; hearing before Judge Billings on fee application; read city's new motion and memorandum requesting dismissal of complaint based on <i>Hallstrom</i> ; read and analyze city's supplemental memo in support of its opposition to plaintiffs' application for attorney's fees; read and analyze city's interrogatories and requests to produce regarding attorney's fees; further analysis of <i>Hallstrom</i> and other notice cases;
12/12/89	8.0	1360.00	Return to Arizona; outline responses to city's new motion for dismissal, discovery and supplemental memorandum of fees
12/15/89	1.5	255.00	lengthy [sic] phone conference with attorney Bland on city's dismissal motion, discovery and fees hearing; read Free Press articles on city's position on relocating dump and closure of landfill;
12/22/89	1.5	255.00	Read and edit draft of plaintiffs' memo in opposition to city's motion and memo for judgment or dismissal; also read and edit plaintiffs' reply in support of an award of fees and costs
12/27/89	1.0	170.00	Fax edits on drafts to attorney Bland; extended phone conference with attorney Bland on edits and "law of case" application

12/28/89	0.5	85.00
Phone conference with attorney Bland on timely filings and further hearings on motions		
1/10/90	0.3	85.00
Phone conference with attorney Bland on city's supplemental memorandum in support of city's motion		
1/15/90	1.0	170.00
Read and analyze city's supplemental memorandum; compare to <i>Hallstrom</i> language		
3/04/90	0.2	34.00
Read attorney Bland letter to Dagues		
3/16/91	2.0	340.00
Read and analyze Judge Billing's decision to deny the city's motion for judgment or dismissal focusing on <i>Hallstrom</i> ; lengthy phone conference with attorney Bland about decision; phone conference with attorney Gallagher;		
4/03/90	1.0	170.00
Read and analyze Judge Billing's decision granting plaintiffs' attorney fees; lengthy phone conference with attorney Bland		
4/06/90	0.4	68.00
Phone conference with attorney Bland about fee award and city position on payment		
4/07/90	0.3	51.00
Phone conference with attorney Bland on city's refusal to pay fee award presently		
4/11/90	2.0	340.00
Review city's letter regarding payment of attorney's fees and request for interlocutory appeal by using F.R.A.P. 5 and 28 U.S.C. 1292(b); analyze strategy options; phone conference with attorney Bland		

4/13/90	1.3	221.00
Read attorney Bland's letter; read and edit draft petition for enforcement of order; phone conference with attorney Bland		
4/16/90	0.3	51.00
Phone conference with attorney Bland		
4/19/90	0.3	51.00
Review attorney McKearin's letter on payment of Dr. Kaczmar's bill		
4/20/90	0.3	51.00
Phone conference with attorney Bland on Kaczmar's bill and hearing on enforcement petition		
4/26/90	1.5	255.00
Review city's memorandum in opposition to plaintiff's petition for enforcement of fee order and city's motion of entry of judgment and supporting memorandum; research applicability of Rule 54(b) to case; phone conference with attorney Bland		
4/29/90	4.8	816.00
Detailed analysis of city's strategy to seek Rule 54(b) order thereby cutting off pendent state claims trial and payment of attorney's fees; research Rule 54(b) use		
4/30/90	1.3	221.00
Review argument made in opposition to city motion; phone conference with attorney Bland on edits		

William W. Pearson

77.5 hours at \$170.00/hour = \$13,175.00

Total Services Rendered \$13,175.00

DISBURSEMENTS

DESCRIPTION	AMOUNT
Travel	254.22
Travel	458.00

Total 712.20

FINAL SUMMARY

DESCRIPTION	AMOUNT
CURRENT FEES	13,175.00
CURRENT DISBURSEMENTS	712.20
CURRENT INVOICE TOTAL	\$13,887.20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiffs-Appellees,)	Docket No. 90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT OF MICHAEL G. FURLONG

Michael G. Furlong, being duly sworn, deposes and states the following:

1.

I am a partner in the law firm of Sheehey Brue Gray & Furlong in Burlington, Vermont. I graduated from Middlebury College (B.A., 1973) and Cornell University (J.D., 1978), and I have been in practice in Burlington since 1978.

2.

Having practiced law in Burlington, Vermont for approximately thirteen years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

The customary billing rates for the attorneys in our firm range from \$95 to \$120 per hour. My customary billing rate is \$120 per hour.

I understand that the current billing rate charged by William W. Pearson is \$175 per hour.

I understand that the current billing rate charged by Richard N. Bland is \$100 per hour, and that the billing rates for other attorneys in the firm of Downs Rachin [sic] & Martin range from \$60 to \$175 per hour, depending upon the level of experience.

Based upon my own firm's billing practices and hourly rates, and my general knowledge of the fees customarily charge by other attorneys in Burlington, Vermont, I believe that the hourly rates charge by Mr. Pearson and the hourly rates charged by attorneys in the firm of Downs Rachlin & Martin are within the range of hourly rates charge by attorneys in the Burlington area.

5.

Our firm engages in the general practice of law, with a majority of our work involving business and commercial matters.

Our firm does not do extensive plaintiffs' work on a contingency fee basis. When we do so, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return to the firm more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Michael G. Furlong
Michael G. Furlong

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 20th day of June, 1991.

/s/ Denise M. Longchamp
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiffs-Appellees,)	
v.)	Docket No. 90-7544
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT OF ROBERT A. MELLO

Robert A. Mello, being duly sworn, deposes and states the following:

1.

I am an attorney in South Burlington, Vermont. I graduated from St. John's Seminary in 1968 and Boston College (J.D., 1971), and I have been in practice in the Burlington area since 1975.

2.

Having practiced law in Burlington, Vermont for approximately 19 years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

My customary billing rate for fee-paying clients is \$105-135 per hour.

4.

I am professionally and personally acquainted with William Pearson and Richard N. Bland, formerly with the law firm of Downs Rachlin & Martin, and I believe them to possess a high degree of knowledge and expertise in the field of environmental law.

5.

I understand that the current billing rate charged by Mr. Pearson is \$170 per hour, and that charged by Mr. Bland is \$100 per hour. I further understand that the billing rates for attorneys in the firm of Downs Rachlin & Martin range from \$60-\$175 per hour, depending upon the level of experience. I also understand that the billing rates for legal assistants in the firm of Downs Rachlin & Martin range from \$50-\$65 per hour, depending upon the level of experience.

Based upon my own hourly rate, and my general knowledge of the hourly rates charged by other attorneys and legal assistants in the Burlington area, I believe that the hourly rates charged by the law firm of Downs Rachlin & Martin are within the range of hourly rates charged by other law firms in the Burlington area.

6.

I engage in the general practice of law. When I take on plaintiffs' work on a contingency basis, the fees

charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Robert A. Mello
Robert A. Mello

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 21st day of June, 1991.

/s/ Joanne Aja Simpson
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)
DAGUE, JR., BETTY DAGUE,)
and ROSE A. BESSETTE,)

Plaintiffs-Appellees,)
v.)

CITY OF BURLINGTON,)
Defendant-Appellant)

) Docket No. 90-7544

AFFIDAVIT OF JON R. EGGLESTON

Jon R. Eggleston, being duly sworn, deposes and states the following:

1.

I am a duly licensed attorney admitted to practice in Vermont. I received my B.A. from the University of Denver in 1968, my J.D. from Cornell University in 1971 and an LL.M. in Taxation in 1975 from the Georgetown University Law Center. I am admitted to practice before the U.S. District Court for the District of Vermont.

2.

I am a partner in the firm of Miller, Eggleston & Rosenberg in Burlington, Vermont and am engaged in general corporate law and taxation.

3.

Having practiced law in Vermont since 1971, I am familiar with hourly rates charged by law firms and attorneys in the Burlington area.

4.

I personally charge clients at the rate of \$175 per hour.

5.

Based upon my own hourly rate, and my knowledge of the fees customarily charged by attorneys in this community, I believe that the current hourly rates charged by William W. Pearson and Richard N. Bland, \$170 per hour and \$100 per hour, are reasonable hourly rates for the Burlington legal market.

6.

My firm seldom represents plaintiffs on a contingency fee basis. This is because a contingent fee which will be equal only to our usual hourly rates offers no incentive for taking on such work. Indeed, it is my belief, based on my knowledge and experience of the Burlington legal community, that lawyers who take such contingency cases expect to recover a multiple of their usual hourly rate if they were to avail in the case. Without this expectation, there is no incentive for taking a contingency case.

/s/ Jon R. Eggleston
Jon R. Eggleston

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 24th day of June, 1991.

/s/ Kimberley A. Coon
Notary Public
Commission Expires 2-10-95

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

_____)	<u>90-7544</u>
Ernest Dague, Sr., Ernest)	<i>Docket Number</i>
Dague, Jr., Betty Dague,)	
and Rose A. Bessette)	NOTICE OF MOTION
v.)	
City of Burlington)	<i>state type of motion</i>
Use short title)	for <u>Attorney Fees</u>
_____)	

MOTION BY: (Name and tel. no. of law firm and of attorney
in charge of case)

William W. Pearson, Esq.	Heather Briggs, Esq.
Molloy, Jones & Donahue	Downs Rachlin & Martin
P.O. Box 2268	P.O. Box 190
Tucson, AR 85702	Burlington, VT 05402

OPPOSING COUNSEL: (Name and tel. no. of law firm and
of attorney in charge of case)

Michael B. Clapp, Esq.
Dinse Erdmann & Clapp
P.O. Box 988
Burlington, VT 05402

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:**

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of
argument notice? ☐ Yes ☐ No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

**EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL**

Has request for relief
been made below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate
need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain
the status quo until the motion
is heard? ☐ Yes ☐ No

** Second Circuit decision was issued June 12, 1991.

Brief statement of the relief requested:

Plaintiffs-Appellees request an award of attorney fees and expenses incurred in pursuing a successful appeal in this Court.

Complete Page 2 of This Form

By: *(signature of attorney)*

/s/ William W. Pearson/lb
William W. Pearson

/s/ Heather Briggs
Heather Briggs

Signed names must be printed beneath

Appearing for: *(Name of party)*

Ernest Dague, Sr.,
Ernest Dague, Jr., Betty
Dague, and Rose A.
Bessette

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☒ Plaintiff ☐ Defendant

Date

6/25/91

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Attachment A.

Brief statement of the facts *(with page references to the moving papers)*:

Attachment A.

Summary of the argument *(with page references to the moving papers)*:

Attachment A.

ATTACHMENT A

Statement of the issue(s) presented by this motion:

To determine the amount of attorney fees and expenses to which plaintiffs-petitioners are entitled based on their successful appeal to this court.

Brief statement of the facts (with page references to the moving papers):

Plaintiffs brought suit in the United States District Court for the District of Vermont against the City of Burlington for alleged violations of state and federal laws arising out of the operation of a landfill. After a bench trial, the Court found that Defendant had operated a landfill in violation of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). The District Court found that the Defendant had operated the landfill in violation of open dumping practices, 42 U.S.C. § 6945(a); that the landfill may have presented a imminent and substantial endangerment to health or the environment, 42 U.S.C. § 6972(a) (1) (1b); and that the landfill had discharged pollutants into waters of the United States in violation of 33 U.S.C. § 1311. The District Court also found that Plaintiffs had substantially prevailed and awarded them attorney fees pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). The Court also awarded Plaintiffs' expenses, including expert witness fees.

Defendant appealed from both the award of attorney fees and the denial by the District Court of a motion by the City to dismiss, made on the ground that Plaintiffs had failed to comply with the notice and delay requirements for citizen suits under 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a).

This Court affirmed the District Court's judgment in all respects on June 12, 1991.

Summary of the argument (with page references to the moving papers):

Under RCRA and CWA, the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney fees and expenses. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d). Plaintiffs-petitioners respectfully request that, based upon the attached Affidavit of Counsel, Legal Memorandum and other supporting documents, attorney fees in the amount of \$53,315.00 be awarded to plaintiffs-petitioners and that this amount should be enhanced 25% (\$13,328.75) to \$66,643.75. Plaintiffs-petitioners further request that attorney expenses be awarded in the amount of \$2,240.34.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)
DAGUE, JR., BETTY DAGUE,)
and ROSE A. BESSETTE,)
Plaintiffs-Appellees,) Docket NO. 90-7544
v.)
CITY OF BURLINGTON,)
Defendant-Appellant)

PLAINTIFFS' APPLICATION FOR AWARD OF
FEES AND COSTS INCURRED ON APPEAL

Plaintiffs submit this application for their costs of litigation, including attorney fees and expenses, incurred in this action. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, provide that the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney and expert witness fees. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

On October 31, 1989, Plaintiffs submitted a fee application covering fees and expenses through that date, but *excluding* items properly includable on a bill of costs. On April 2, 1990, the district court ordered an interim award of \$247,534.37, including a 25% risk enhancement. An interlocutory appeal was filed by Defendant. This Court affirmed the District Court's order on June 12, 1991. Plaintiffs now seek to recover fees incurred during this appeal. In support of this application, Plaintiffs submit

affidavits and other documentation to substantiate the requested fees and expenses.

WHEREFORE, Plaintiffs respectfully request that, based upon the attached affidavits of counsel, legal memorandum and other supporting documents, supplemental attorney fees in the amount of \$53,315.00 be awarded to Plaintiffs and that this amount be enhanced 25% (\$13,328.75) pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984) and the district court's order of April 2, 1990, for a total of \$66,643.75. Plaintiffs further request that the Court award \$2,240.34 for attorney expenses incurred in this matter plus interest at the prevailing federal rate, 28 U.S.C. § 1961, from the date of judgment to the date of payment.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-
Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiffs-Appellees,)	Docket NO. 90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs submit this memorandum in support of their supplemental application for attorneys fees and expenses.

I. Statement of Facts

Plaintiffs Ernest Dague, Sr. Ernest Dague, Jr., Betty Dague and Rose A. Bessette brought this action against the City of Burlington, Vermont ("the City") for alleged violations of federal and state law arising out of the operation of the Burlington Municipal Disposal Grounds ("the Landfill"). Plaintiffs commenced this action under the citizen suit provisions of the Resource Conservation

and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under pendent state claims. Plaintiffs sought injunctive relief, imposition of civil penalties, compensatory and punitive damages for their pendent state claims, costs, and attorneys fees.

After a bench trial, the Court issued its Findings of Fact, Opinion and Order, finding Defendant liable on four of the five statutory counts of Plaintiffs' Complaint. Thereafter, "[h]aving determined that plaintiffs have substantially prevailed in both their RCRA and CWA claims," the district court assessed fees and expenses in the amount of \$247,534.37. The Defendant appealed and this Court affirmed the judgment of the district Court. Plaintiffs now move for an award of their costs of defending their judgment on appeal, including attorney fees and expenses incurred in this action.

II. Argument and Authority

The starting point for any calculation of attorneys fees is the "lodestar," the product of a reasonable hourly rate and the number of hours reasonably expended on substantive issues on which the petitioner satisfies the statutory threshold of success. *Sierra Club v. EPA*, 769 F.2d 796, 23 ERC 1001, 1002 (D.C. Cir. 1985; *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). After the lodestar is calculated, a determination must be made as to whether any enhancement of the lodestar is appropriate. *Sierra Club*, 769 F.2d at 809-10.

A. Calculation of the Lodestar

This Court has already determined that Plaintiffs have substantially prevailed on their federal claims, thereby entitling them to a fully compensatory fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). All that remains to be decided is whether the additional fees sought by Plaintiffs are based on "reasonable" rates and "reasonable" hours. "In computing the fee, counsel for [Plaintiffs as] prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136, 1147 (D.R.I. 1977) (analysis utilized in civil rights actions applicable to environmental cases) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976)).

Plaintiffs' attorneys have submitted two affidavits stating their rates are those usually charged to clients who pay on an hourly basis, (Exhibits 1 and 2), as well as affidavits from other attorneys in Burlington, Vermont stating that the applicable rates for Downs Rachlin & Martin attorneys (and for Mr. Pearson, who is currently practicing in Tucson, Arizona in the field of environmental law and whose current billing rate is \$170 per hour), are reasonable. (Exhibits 3, 4 and 5). *Blum v. Stenson*, 465 U.S. 886 (1989). Plaintiffs' application is further supported by itemized contemporaneous records for all time expended. (Exhibits 1 and 2). The descriptive entries show that all time spent was reasonably necessary.

Accordingly, Plaintiffs submit that the appropriate lodestar is \$53,315.00 in attorneys fees.

B. Enhancing the Lodestar

The next step to consider is whether an enhancement of the lodestar amount is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) ("Delaware Valley II"); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). An enhancement is appropriate here.

The purpose behind applying an enhancement or multiplier is to attract competent counsel. *SPIRG of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 27 ERC 1409, 1421 (3rd Cir. 1988); *Delaware Valley II*, 107 S.Ct. 3078 (1987). Simply stated, if plaintiffs' attorneys can receive as a *maximum* only the lodestar amount, after risking complete nonpayment as well as the hardships imposed by delay, lack of cash-flow, and out-of-pocket expenses, then competent counsel will be reluctant to serve on behalf of private attorneys general. The purpose underlying the "multiplier" is to balance the inherent inequities between plaintiffs and fee-paying defendants and to reward attorneys who take on public interest cases and achieve substantial results.

In this case, the Court has already determined that the enhancement of 25 percent ordered by the district court is appropriate. Accordingly, Plaintiffs request that the fees expended on appeal also be enhanced by the same amount.

C. Expenses

In addition to attorneys fees, Plaintiffs request that they be awarded reasonable expenses not otherwise

recoverable in a bills of costs,¹ incurred in this action. Plaintiffs counsel has attached an affidavit setting forth that these expenses were necessary and reasonably incurred and has attached copies of applicable bills and receipts, totalling \$2,240.34. (Exhibits 1 and 2). Accordingly, Plaintiffs request that this amount also be awarded.

An award of costs in this case is not limited to those normally allowed pursuant to 28 U.S.C. § 1920 or F. R. Civ. P. 54. While there are few environmental cases on this point, case law developed under other fee-shifting statutes instructs that all reasonable out-of-pocket expenditures are to be awarded. *Shorter v. Valley Bank and Trust Co.*, 678 F.Supp. 714, 726 (N.D. Ill 1988) (FLSA); *Reichman v. Bonsignore & Mazzotta*, 818 F.2d 278 (2d Cir. 1987) (citing *Laffey v. Northwest Airlines, Inc.*, 747 F.2d 4, 30 (D.C. Cir. 1984)); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988) (ADEA); *Kossmann v. Calumet [sic] County*, 849 F.2d 1027, 1030 (7th Cir. 1988) (ADEA); *Hidle v. Geneva County Board of Education*, 681 F. Supp. 752, 758 (D.C. Ala. 1988); *Laffey*, 746 F.2d at 30; *Thompson v. Sawyer*, 586 F.Supp. 635, 643 (D.D.C. 1984) (Title VII); *Planells v. Howard University*, ___ F.Supp. ___, 34 FEP 66, 71 (D.C.D.C.-1984) (Title VII); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 289 (N.D. Ill 1983) (ADEA).

Courts addressing claims under environmental protection statutes have stated that the general policies underlying awards of fees and expenses in civil rights cases apply to similar fee requests and under environmental statutes. *See, e.g., Pennsylvania v. Delaware Valley*

¹ Plaintiffs have submitted a separate Bill of Costs.

Citizens' Council for Clean Air, 106 S.Ct. 3088, 24 E.R.C. 1577 (1986) ("*Delaware Valley I*"); *SPIRG of New Jersey v. AT&T*, 842 F.2d 1436, 1439 n.1 (3rd Cir. 1988); *Save Our Sound Fisheries Association v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977).

Courts resolving fee issues under the Clean Air Act, 42 U.S.C. § 7607(f), a fee shifting statute substantially similar to the fee shifting provision in RCRA and the CWA, (*SPIRG of New Jersey*, 842 F.2d at 1439 n.1) have awarded costs similar to those requested by Plaintiffs here. *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985) (awarding telephone, photocopying, postage costs); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6-8 (D.C. Cir. 1982) (travel, postage, copies of legislative history and transcript expenses awarded). All expenses requested by Plaintiffs are therefore reimbursable.

D. Interest

Plaintiffs are entitled to an award of interest pursuant to 28 U.S.C. § 1961.

III. CONCLUSION

Plaintiffs respectfully request the Court to award attorneys fees in the amount of \$53,315.00, to enhance said fees 25% (for a total fee award of \$66,643.75), to award \$2,240.34 for expenses, such fees and expenses relating directly to the appeal to this Court, and post-judgment interest at the rate of 6.09% from June 12, 1991 to the date of payment by the Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-
Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs
Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Not reproduced is original documentation (invoices, receipts, etc.) of expenses and disbursements totalling \$2240.34, the amount of which is not disputed.

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST	)	Docket NO. 90-7544
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiffs-Appellees,)	
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR AWARD OF FEES AND
COSTS ON APPEAL

STATE OF VERMONT)
CHITTENDEN COUNTY) SS.

Heather Briggs, being duly sworn, deposes and states as follows:

1.

I am an attorney in the law firm of Downs Rachlin & Martin, attorneys for Plaintiffs in this action. This affidavit provides the specification and itemization necessary for recovery of costs of litigation, including reasonable attorney fees and expenses, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2.

Attached hereto as Exhibit 1 are the billing statements by this law firm for legal services performed in this appeal. These billings are accurate and true representations of work actually performed, compiled from time slips prepared by the attorney or legal assistant performing the work described. Time slips are prepared by each attorney and legal assistant on a daily basis and reflect actual time spent on the matter, as well as a description of the work performed. As shown in Exhibits 1 and 2, the total amount of Plaintiffs' attorneys fees incurred from May 7, 1990 to present is \$53,315.00.

3.

Attached are copies of the expense receipts incurred in this Court, exclusive of amounts relating to the appeal and of any amount to be included in Plaintiffs' Bill of Costs. These receipts are accurate and true representations of expenses actually incurred and total \$1,453.00. Certain other expenses were also necessarily incurred for which no receipts are available: (1) telephone \$199.50; (2) postage \$351.20; (3) Travel \$137.75; (4) computer legal research \$26.39; (5) photography \$3.00; and (6) copying \$69.50.¹ These expenses total \$787.34. Thus, total expenses per Exhibits 1 and 2, not otherwise recoverable in a Bill of Costs are \$2,240.34.

¹ The practice of Downs Rachlin & Martin is to pass necessarily incurred litigation expenses on to fee-paying clients and not to increase hourly rates to absorb such expenses.

4.

William W. Pearson served as lead counsel for Plaintiffs in this matter. He was first admitted to the Indiana Bar and the U.S. District Court, Southern District of Indiana, in 1971; the Vermont Bar in 1975; the U.S. District Court, District of Vermont, in 1977; the U.S. Court of Appeals, Second Circuit, in 1986; the Arizona Bar and the U.S. District Court, District of Arizona, in 1989. He received his undergraduate degree from University of Chicago in 1968. He then attended Georgetown University Law Center where he received his J.D. in 1971. He is presently a member of the Arizona, Vermont and American Bar Associations.

Mr. Pearson is an experienced trial attorney in the field of environmental law. His experience with environmental legal problems includes hazardous waste management, toxic torts, NPDES permits, landfills, hazardous waste risk management and commercial lending, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

5.

Richard Bland assisted Mr. Pearson in this matter. Mr. Bland was first admitted to the Vermont Bar in 1985; the U.S. District Court, District of Vermont, in 1986; and the Supreme Court of the United States in 1989. Mr. Bland received his undergraduate degree from University of Vermont in 1982. He then attended Washington University School of Law where he received his J.D. in 1985. Mr.

Bland is presently a member of the Chittenden County, Vermont and American Bar Associations.

Mr. Bland was, during his employment with this firm, a trial attorney whose practice was primarily in the field of environmental law. He has experience in resolving environmental legal problems involving hazardous waste management, including the generation, transportation, storage and disposal of hazardous waste, landfills, RCRA, CWA, Superfund, asbestos, underground storage tanks, hazardous waste risk management and commercial lending, and insurance coverage for environmental claims.

6.

Based upon personal knowledge of hourly rates charged by other attorneys in the Burlington area with similar experience, reputation and skill, I know that rates from \$100 - \$175 per hour are routinely charged. As shown in Exhibit 1, there are varying levels of rates charged by the law firm of Downs Rachlin & Martin. Work performed by partners is billed at \$100 - \$175 per hour. Work performed by associates is billed at \$65 - \$110 per hour, depending on the level of experience. The following is a list of each attorney and legal assistant who worked on this case, the amount of time they spent on this appeal, and their hourly rates:

James C. Gallagher	2.60	HOURS AT	145.00/HR	=	377.00
Heather Briggs	22.70	HOURS AT	145.00/HR	=	3,291.50

Richard N. Bland	0.90	HOURS AT	110.00/HR	=	99.00
Richard N. Bland	256.80	HOURS AT	90.00/HR	=	23,112.00
Anita R. Tuttle	14.20	HOURS AT	90.00/HR	=	1,278.00
Michael J. Case	8.90	HOURS AT	60.00/HR	=	534.00
Michael J. Case	2.70	HOURS AT	55.00/HR	=	148.50
Keith E. Wexelblatt	7.20	HOURS AT	35.00/HR	=	252.00

7.

In order to substantiate that the requested hourly rates are reasonable, attached are Exhibits 3, 4 and 5 which are affidavits from attorneys in the Burlington area which set forth their respective billing rates and further indicate the hourly rates for counsel with similar experience, reputation and skill.

8.

The environmental practice at Downs Rachlin & Martin has been limited to representing fee-paying clients, because of the risk associated with the representation of private attorneys general and plaintiffs on a contingency fee basis. Thus, most of the hours spent on this matter would have been spent representing other clients who would pay our hourly rates on a monthly basis.

Nevertheless, all work associated with Defendant's statutory liability was taken on a contingent basis: had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims. In fact, to date, this firm has not received any payment for its services.

An important factor in this firm's decision to pursue Plaintiffs' statutory claims was the opportunity to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount. This incentive, in my professional opinion, is necessary to attract competent counsel to represent private attorneys general in public interest litigation. Accordingly, I am of the opinion that Plaintiffs would have faced extreme difficulties in finding other local counsel of similar experience to pursue their claims under RCRA and the CWA on an hourly rate to be paid only on the contingency of success.

6-25-91
Date

/s/ Heather Briggs
Heather Briggs

Sworn to and subscribed before me this 25th day of June, 1991.

/s/ Anita R. Tuttle
Notary Public
Commission Expires: 2-10-95

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

June 24, 1991

MRS. ERNEST DAGUE
272 MANHATTAN DRIVE
BURLINGTON, VT 05401

FILE NUMBER: 23690001

DRAFT NUMBER: 1.002

FOR THE PERIOD THROUGH June 24, 1991

DAGUE V. CITY OF BURLINGTON

Sample Entry -

Date:	Atty:	Hours:	Amount:
Description of Services:			

05/08/90	RNB	3.50	315.00
REVIEW AND ANALYZE COURT'S ORDER OF 4 MAY 1990 AND JUDGMENT OF 7 MAY 1990; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND ANALYZE ISSUES FOR CROSS APPEAL; REVIEW FEDERAL RULES OF APPELLATE PROCEDURE AND RULES APPLICABLE TO APPEALS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT.			

05/09/90	RNB	2.00	180.00
LEGAL RESEARCH ON ABILITY OF CITIZENS TO ENFORCE FEDERAL RCRA HAZARDOUS WASTE REQUIREMENTS AND REGULATIONS WHEN STATE HAS RECEIVED EPA - AUTHORIZATION TO ADMINISTER A HAZARDOUS WASTE PROGRAM.			

05/10/90	RNB	4.30	387.00
LEGAL RESEARCH ON CITIZEN SUITS UNDER RCRA IN STATES WITH EPA-APPROVED HAZARDOUS WASTE PROGRAMS; LEGAL RESEARCH ON ASSESSING CIVIL PENALTIES UPON VIOLATIONS OF CWA AND RCRA; LEGAL RESEARCH ON PRECLUSION OF CITIZEN SUIT UNDER RCRA AND CWA BY DILIGENT PROSECUTION OF ACTION BY GOVERNMENT AUTHORITY TO REQUIRE COMPLIANCE WITH THE ACTS.			
05/17/90	RNB	0.50	45.00
FURTHER ANALYSIS OF COURT'S FINDINGS OF FACT, OPINION AND ORDER OF OCTOBER 15, 1989 REGARDING HAZARDOUS WASTE PERMIT AND NOTIFICATION REQUIREMENTS OF RCRA			
05/23/90	RNB	0.50	45.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON [sic] REGARDING CROSS-APPEAL ISSUES.			
05/24/90	RNB	1.50	135.00
LEGAL RESEARCH UNDER VERMONT LAW REGARDING REQUIREMENTS FOR HAZARDOUS WASTE DISPOSAL FACILITIES.			
05/31/90	RNB	2.80	252.00
LEGAL RESEARCH ON ASSESSMENT OF CIVIL PENALTIES UPON A VIOLATION OF CLEAN WATER ACT.			
06/05/90	RNB	3.80	342.00
LEGAL RESEARCH ON STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TSD FACILITIES, INCLUDING POST-CLOSURE PERMITTING REQUIREMENTS FOR SUCH FACILITIES;			

LEGAL RESEARCH ON NOTICE PROVISIONS OF RCRA AND THE APPLICATION OF PRIMARY JURISDICTION AND COLLATERAL ESTOPPEL DOCTRINES TO CITIZENS SUITS UNDER FEDERAL ENVIRONMENTAL STATUTES.

06/06/90	RNB	1.00	90.00
REVIEW CITY'S NOTICE OF APPEAL; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PROCEDURE AND ISSUES ON APPEAL; DRAFT NOTICE OF CROSS APPEAL.			
06/08/90	RNB	4.80	432.00
TELEPHONE CONFERENCE WITH MS. CHRISTINE BAKER, APPEALS COORDINATOR, REGARDING FILING DATE OF CITY'S NOTICE OF APPEAL AND FILING FEE FOR A CROSS APPEAL; FURTHER REVIEW AND ANALYSIS OF COURT'S FINDINGS OF FACT, OPINION AND ORDER OF OCTOBER 17, 1989; FURTHER ANALYZE LUTZ CASE REGARDING CITIZEN SUITS UNDER EPA AUTHORIZED STATE HAZARDOUS WASTE PROGRAM; REVIEW PLAINTIFFS' PROPOSED FINDINGS OF FACT AND TRIAL MEMORANDUM; REVIEW DOCKET ENTRIES; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CROSS APPEAL ISSUES.			
06/11/90	RNB	2.70	243.00
DRAFT STATEMENT OF ISSUES PROPOSED TO BE RAISED ON CROSS APPEAL FROM APPELLATE FORM C; LETTER TO ATTORNEY PEARSON REGARDING SAME; REVIEW			

ATTORNEY MCKEARIN'S 8 JUNE 1990 LETTER TO MR. CURRIE REGARDING TRANSCRIPT OF TRIAL AND REVIEW CITY'S FORM D REGARDING TRANSCRIPT INFORMATION; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME, AND CERTIFICATION OF COURT'S ORDERS OF OCTOBER 17, 1990 AND APRIL 2, 1990 AND CITY'S POSSIBLE WAIVER OF NOTICE ISSUE.

06/18/90 RNB 3.30 297.00

REVIEW ATTORNEY MCKEARIN'S 14 AND 15 JUNE 1990 LETTERS TO MS. GOLDSMITH; REVIEW AND ANALYZE CITY'S FORM C, CIVIL APPEAL PRE- ARGUMENT STATEMENT; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND WHETHER OR NOT TO CROSS APPEAL; FURTHER LEGAL RESEARCH ON RULE 54(B) CERTIFICATION REGARDING APPELLATE REVIEW OF ORDERS NOT CERTIFIED.

06/19/90 RNB 0.30 27.00

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DECISION TO FILE CROSS APPEAL.

06/20/90 RNB 0.40 36.00

EXTENDED TELEPHONE CONFERENCE WITH MS. PEGGY MULHERN OF SIERRA CLUB REGARDING ITS POSSIBLE INTERVENTION ON APPEAL AS AMICUS CURIAE.

06/21/90 RNB 0.40 36.00

EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING POSSIBLE INTERVENTION ON APPEAL BY

SIERRA CLUB AND TIMING OF AND PROCEDURE ON APPEAL.

06/22/90 RNB 3.30 297.00

DESIGNATE DOCUMENTS FROM DOCKET ENTRIES AND SELECT EXHIBITS TO BE INCLUDED IN RECORD ON APPEAL; COMPILE RELEVANT DOCUMENTS FOR PARTIES' JOINT APPENDIX.

06/25/90 RNB 0.80 72.00

REVIEW PRE-ARGUMENT CONFERENCE NOTICE, CIVIL APPEAL SCHEDULING ORDER #1; DIARY CALENDAR REGARDING SAME; TELEPHONE CONFERENCE WITH ATTORNEY ROBERT MCKEARIN REGARDING POSTPONEMENT OF PRE-ARGUMENT CONFERENCE.

06/26/90 RNB 1.30 117.00

REVIEW ATTORNEY MCKEARIN'S 25 JUNE 1990 LETTER TO MR. STANLEY BASS REGARDING COURT'S ORDER OF MAY 4, 1990, AND POSTPONEMENT OF PRE-ARGUMENT CONFERENCE AND EXTENSION OF DEADLINES IN SCHEDULING ORDER; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; COMPLETE NOTICE OF APPEARANCE; LETTER TO ATTORNEY PEARSON REGARDING SAME.

06/27/90 RNB 0.20 18.00

TELEPHONE CONFERENCE WITH CLERK OF COURT OF APPEALS REGARDING PRE-ARGUMENT CONFERENCE.

06/29/90 RNB 0.80 72.00

TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING PRE-ARGUMENT CONFERENCE, CIVIL APPEAL SCHEDULING

ORDER #1, AND COMPOSITION OF RECORD ON APPEAL; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

07/02/90 RNB 0.70 63.00

REVIEW AND ANALYZE SECOND PRE-ARGUMENT CONFERENCE NOTICE FROM SECOND CIRCUIT COURT OF APPEALS; REVIEW JUDGE BILLINGS' 4 MAY 1990 ORDER IN LIGHT OF SAME.

07/03/90 RNB 0.50 45.00

EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SECOND PRE-ARGUMENT CONFERENCE NOTICE AND 54(B) CERTIFICATION.

07/05/90 RNB 5.30 477.00

TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING SCHEDULING ORDER AND COMPILATION OF RECORD ON APPEAL; FOLLOW-UP TELEPHONE CONFERENCE WITH CLAPP REGARDING SELECTION OF DOCUMENTS FROM DOCKET ENTRIES AND EXHIBITS FOR RECORD ON APPEAL; TELEPHONE CONFERENCE WITH MR. WILLIAM CURRIE REGARDING TRANSCRIPT OF TRIAL; THOROUGH PREPARATION FOR DISCUSSION OF ALL ISSUES IN PRE-ARGUMENT CONFERENCE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING ATTORNEY PEARSON'S 4 NOVEMBER 1985 AFFIDAVIT, CERTIFIED COPY OF DOCKET ENTRIES, AND LIST OF EXHIBITS; LETTER TO ATTORNEY CLAPP REGARDING EXHIBIT LISTS.

07/06/90 RNB 2.30 207.00

TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF RECORD ON APPEAL AND JOINT APPENDIX; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE.

07/09/90 RNB 3.30 297.00

BRIEF TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR PRE-ARGUMENT CONFERENCE; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE.

07/10/90 RNB 3.80 342.00

EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON IN PREPARATION FOR PRE-ARGUMENT CONFERENCE; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE; ATTEND PRE-ARGUMENT CONFERENCE BY TELEPHONE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; REVIEW AND DESIGNATE DOCKET ENTRIES AND EXHIBITS FOR INCLUSION IN THE JOINT APPENDIX.

07/11/90 RNB 1.80 162.00

TELEPHONE CONFERENCE WITH MR. WILLIAM CURRIE REGARDING TRANSCRIPT OF TRIAL; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPLETION OF TRANSCRIPT, RECORD ON APPEAL, AND JOINT APPENDIX; STATUS REPORT TO ATTORNEY GALLAGHER REGARDING PRE-ARGUMENT CONFERENCE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF

RECORD ON APPEAL; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP AND MR. BASS REGARDING EXTENSION OF DEADLINES FOR FILING BRIEFS.

07/12/90 RNB 6.00 540.00

CONTINUE TO PREPARE FOR APPEAL, INCLUDING ANALYSIS OF AND LEGAL RESEARCH ON ISSUES PROPOSED TO BE RAISED ON APPEAL BY CITY; LETTER TO ATTORNEY CLAPP REGARDING RECORD; REVIEW AND ANALYZE VOL. I OF TRANSCRIPT OF TRIAL.

07/13/90 RNB 5.50 495.00

TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF RECORD ON APPEAL AND CITY'S INTENT TO APPEAL DISMISSAL OF THIRD-PARTY DEFENDANTS; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND REVISED SCHEDULING ORDER; REVIEW AND ANALYZE VOLUME II OF TRANSCRIPT OF TRIAL.

07/14/90 RNB 4.70 423.00

REVIEW AND ANALYZE VOLUMES III AND IV OF TRANSCRIPT OF TRIAL.

07/16/90 RNB 5.30 477.00

REVIEW ATTORNEY CLAPP'S 13 JULY 1990 LETTER TO MS. BARBER REGARDING RECORD ON APPEAL; LETTER TO ATTORNEY PEARSON REGARDING SAME AND NOTICE OF APPEARANCE; FURTHER REVIEW AND ANALYSIS OF TRANSCRIPT OF TRIAL.

07/17/90 RNB 4.30 387.00

REVIEW DESIGNATED RECORD ON APPEAL AS SUBMITTED BY MS. CHRISTINE BARBER;

LETTER TO ATTORNEY CLAPP REGARDING JOINT APPENDIX; CONTINUE TO PREPARE FOR APPEAL.

07/18/90 RNB 4.00 360.00

CONTINUE TO REVIEW AND ANALYZE RECORD ON APPEAL.

07/19/90 RNB 4.30 387.00

SELECT TRANSCRIPT EXCERPTS FOR INCLUSION IN THE JOINT APPENDIX; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE REGARDING PLAINTIFFS-APPELLEES' DESIGNATION OF CONTENTS OF THE JOINT APPENDIX; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SAME, CITY'S INTENT TO RAISE ISSUE OVER DISMISSAL OF THIRD-PARTY DEFENDANTS, AND CITY'S INTENT TO REQUEST ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF; CONTINUE TO REVIEW AND ANALYZE RECORD ON APPEAL.

07/20/90 RNB 2.80 252.00

LETTER TO ATTORNEY PEARSON; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING NOTICE OF APPEARANCE, CONTENTS OF JOINT APPENDIX AND FILING DEADLINES; FURTHER REVIEW AND ANALYSIS OF PLAINTIFFS' TRIAL MEMORANDUM.

07/21/90 RNB 0.40 36.00

EXTENDED TELEPHONE CONFERENCE WITH ATTORNEYS MCKEARIN AND CLAPP REGARDING CITY'S REQUEST FOR ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF.

07/23/90 RNB 1.30 117.00

LETTER TO MRS. GOLDSMITH REGARDING FILING OF NOTICE OF APPEARANCE FOR PLAINTIFFS-APPELLEES; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S DESIGNATION OF DOCKET ENTRIES FOR INCLUSION IN JOINT APPENDIX; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN AND STAFF COUNSEL REGARDING CITY'S REQUEST FOR ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF; BRIEF FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S SUPPLEMENTAL DESIGNATION OF DOCKET ENTRIES FOR INCLUSION IN RECORD ON APPEAL.

07/24/90 RNB 1.00 90.00

LETTER TO ATTORNEY PEARSON REGARDING REVISED SCHEDULING ORDER FOR CITY TO FILE AND SERVE ITS BRIEF; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP'S OFFICE REGARDING JUDGE BILLINGS' ORDER DENYING CITY'S MOTION TO JOIN ADDITIONAL DEFENDANTS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING SAME, FILING DEADLINES AND JOINT APPENDIX.

07/26/90 RNB 4.30 387.00

REVIEW CONTENTS OF JOINT APPENDIX, VOL. I - DOCKET ENTRIES AND VOL. II - TRANSCRIPTS, AND EXHIBITS; REVIEW AND ANALYSIS OF CITY'S BRIEF.

07/27/90 RNB 9.80 882.00

CONTINUE TO REVIEW AND ANALYZE CITY'S BRIEF; REVIEW CIVIL APPEAL SCHEDULING ORDER #2.

07/30/90 RNB 4.30 387.00

REVIEW MS. BARBER'S 27 JULY 1990 LETTER TO MRS. GOLDSMITH REGARDING FIRST SUPPLEMENT TO RECORD ON APPEAL; FURTHER REVIEW AND ANALYSIS OF CITY'S BRIEF; DRAFT STATEMENT OF ISSUES AND NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION OF THE CASE BELOW OF STATEMENT OF THE CASE SECTION FOR APPELLEE'S BRIEF.

07/31/90 RNB 5.80 522.00

REVIEW ATTORNEY CLAPP'S 27 JULY 1990 LETTER TO MS. GOLDSMITH REGARDING FILING OF CITY'S BRIEF; CONTINUE TO DRAFT COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW SECTIONS OF THE STATEMENT OF THE CASE FOR APPELLEE'S BRIEF; REVISE SAME.

08/01/90 RNB 4.30 387.00

BEGIN TO DRAFT STATEMENT OF THE FACTS SECTION OF THE STATEMENT OF THE CASE OF APPELLEE'S BRIEF.

08/02/90 RNB 2.80 252.00

CONTINUE TO DRAFT STATEMENT OF THE FACTS SECTION OF APPELLEES' BRIEF.

08/03/90 RNB 4.80 432.00

CONTINUE TO DRAFT AND REVISE STATEMENT OF THE FACTS SECTION OF APPELLEES' BRIEF; REVISE STATEMENT OF THE CASE OF APPELLEES' BRIEF; EXTENDED

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S BRIEF AND APPELLEES' RESPONSE THERETO.

08/04/90 RNB 4.30 387.00

LEGAL RESEARCH ON COMPLIANCE WITH REGULATIONS PROMULGATED UNDER RCRA AND THE CWA REGARDING NOTICE; FURTHER LEGAL RESEARCH ON PRECLUSION OF CITIZENS' SUIT BY ADMINISTRATIVE ACTION.

08/06/90 RNB 3.50 315.00

FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT I OF ITS BRIEF, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 21 FEBRUARY 1986, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 30 OCTOBER 1986, AND JUDGE BILLINGS' OPINION AND ORDER DATED 15 MARCH 1990.

08/07/90 RNB 9.50 855.00

CONTINUE LEGAL RESEARCH AND ANALYSIS OF DELAY PERIODS OF CITIZEN SUIT PROVISIONS UNDER RCRA AND THE CWA; BEGIN TO DRAFT ARGUMENT I OF APPELLEES' BRIEF, THAT THE DISTRICT COURT CORRECTLY FOUND THAT THE LANDOWNERS GAVE THE REQUISITE PRE-SUIT NOTICE TO VEST IF WITH JURISDICTION OVER THEIR ACTION.

08/07/90 MJC 1.50 82.50

TELEPHONE CONFERENCE WITH DON BESSETTE REGARDING CITY'S PLAN TO PUT PEDESTRIAN PATH ON PROPERTY; TELEPHONE CONFERENCE WITH LAUREL BESSETTE REGARDING SAME; TELEPHONE

CONFERENCE WITH CITY PARKS DEPARTMENT REGARDING SAME; MEMORANDUM TO ATTORNEY BLAND REGARDING SAME.

08/08/90 RNB 8.50 765.00

CONTINUE TO DRAFT ARGUMENT I OF APPELLEES' BRIEF; FURTHER REVIEW AND ANALYSIS OF MAGISTRATE'S REPORT AND RECOMMENDATION DATED 18 APRIL 1988; REVISE ARGUMENT I OF APPELLEES' BRIEF.

08/09/90 RNB 6.50 585.00

FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT II OF ITS BRIEF, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 21 FEBRUARY 1986, JUDGE BILLINGS' OPINION AND ORDER DATED 26 MARCH 1986 AND HIS FINDINGS OF FACT, OPINION AND ORDER DATED 16 OCTOBER 1989; LEGAL RESEARCH ON DISCHARGE OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA.

08/13/90 RNB 13.30 1,197.00

DRAFT ARGUMENT II OF APPELLEE'S BRIEF THAT THE DISTRICT COURT CORRECTLY HELD THAT THE RAILROAD CULVERT IS A POINT SOURCE FOR THE DISCHARGE OF POLLUTANTS FROM THE LANDFILL INTO WATERS OF THE UNITED STATES; ANALYZE AND REVISE SAME; FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT III IN ITS BRIEF AND JUDGE BILLINGS' OCTOBER 16, 1989 OPINION REGARDING COUNT III OF PLAINTIFFS' COMPLAINT.

08/13/90 MJC 1.20 66.00

TELEPHONE CONFERENCE WITH BOB WHATEN AT CITY PARKS DEPARTMENT REGARDING CITY PLANS FOR RIGHT-OF-

WAY; CONFERENCE WITH ATTORNEY BLAND REGARDING SAME; TELEPHONE CONFERENCE WITH LAUREL AND BRIAN BESSETTE REGARDING SAME.

08/14/90 RNB 9.50 855.00

DRAFT ARGUMENT III OF APPELLEES' BRIEF THAT THE DISTRICT COURT CORRECTLY HELD THAT THE LANDFILL MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE ENVIRONMENT IN VIOLATION OF 42 U.S.C. § 6972(A)(1)(B); EXTENSIVE ANALYSIS OF AN REVISE SAME.

08/15/90 RNB 8.80 792.00

FURTHER REVIEW AND ANALYSIS OF ARGUMENT IV OF CITY'S BRIEF; DRAFT ARGUMENT IV A. OF APPELLEE'S BRIEF; ANALYZE AND REGARDING SAME.

08/16/90 RNB 9.30 837.00

FURTHER REVIEW AND ANALYSIS OF ARGUMENT IV OF CITY'S BRIEF; DRAFT ARGUMENT IV B. OF APPELLEES' BRIEF; EXTENSIVE ANALYSIS AND REVISION OF SAME; DRAFT CONCLUSION, TABLE OF CONTENTS AND TABLE OF AUTHORITIES OF APPELLEES' BRIEF; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING APPELLEES' BRIEF.

08/17/90 RNB 1.70 153.00

EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISION OF APPELLEES' BRIEF; FURTHER REVIEW AND ANALYSIS OF APPELLEES' BRIEF.

08/18/90 RNB 3.80 342.00

FOLLOW-UP EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON

REGARDING REVISIONS TO APPELLEES' BRIEF; REVISE APPELLEES' BRIEF; DRAFT LETTER TO MRS. GOLDSMITH REGARDING FILING AND SERVICE OF APPELLEES' BRIEF; DRAFT CERTIFICATE OF SERVICE.

08/20/90 RNB 2.30 207.00

CONTINUE TO REVISE APPELLEES' BRIEF; BEGIN TO PROOFREAD SAME.

08/21/90 RNB 8.30 747.00

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO APPELLEES' BRIEF; BRIEF FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; CONTINUE TO PROOFREAD APPELLEES' BRIEF; SERVICE AND FILING OF SAME.

08/22/90 RNB 0.20 18.00

BRIEF TELEPHONE CONFERENCE WITH CLERK'S OFFICE TO CONFIRM RECEIPT OF APPELLEES' BRIEF FOR FILING.

08/29/90 RNB 1.30 117.00

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT BEFORE SECOND CIRCUIT; BEGIN PREPARATION FOR ORAL ARGUMENT.

08/30/90 RNB 1.70 153.00

PREPARE NOTEBOOK OF CASELAW AND LEGISLATIVE HISTORY FOR ORAL ARGUMENT.

08/31/90 RNB 0.30 27.00

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ORAL ARGUMENT; LETTER TO ATTORNEY PEARSON REGARDING NOTEBOOK OF RELEVANT

CASELAW AND LEGISLATIVE HISTORY FOR
ORAL ARGUMENT.

09/05/90	RNB	1.50	135.00
REVIEW AND ANALYSIS OF APPELLANT'S REPLY BRIEF.			
09/06/90	RNB	1.50	135.00
FURTHER REVIEW AND ANALYSIS OF APPELLANT'S REPLY BRIEF; EXTENDED TELEPHONE CONFERENCE WITH ATTOR- NEY PEARSON REGARDING SAME IN FUR- THER PREPARATION FOR ORAL ARGUMENT.			
09/14/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTOR- NEY PEARSON REGARDING ORAL ARGU- MENT.			
10/09/90	RNB	0.70	63.00
REVIEW NOTICE OF ORAL ARGUMENT; DRAFT ACKNOWLEDGEMENT OF SAME; TELEPHONE CONFERENCE WITH ATTOR- NEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT.			
10/11/90	RNB	2.30	207.00
REVIEW AND ANALYZE BRIEFS FILED ON APPEAL; PREPARE FOR ARGUMENT ON NOTICE ISSUE.			
10/24/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTOR- NEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT.			
10/25/90	RNB	2.80	252.00
REVIEW AN ANALYSIS OF BRIEFS; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ARGUMENTS ON NOTICE ISSUE; FOLLOW- UP EXTENDED TELEPHONE CONFERENCE			

WITH ATTORNEY PEARSON REGARDING
ARGUMENTS ON OTHER ISSUES ON
APPEAL.

10/26/90	RNB	2.50	225.00
FURTHER REVIEW AND ANALYSIS OF BRIEFS IN PREPARATION FOR ORAL ARGU- MENT; FURTHER REVIEW AND ANALYSIS OF HALLSTROM CASE.			
10/28/90	RNB	5.80	522.00
EXTENSIVE ANALYSIS OF NOTICE REQUIRE- MENTS OF CITIZEN SUIT PROVISIONS OF RCRA AND THE CWA, AND FURTHER REVIEW AND ANALYSIS OF BRIEFS ON APPEAL IN PREPARATION FOR ORAL ARGU- MENT; CONFERENCE WITH ATTORNEY PEARSON REGARDING ANALYSIS OF ISSUES AND ARGUMENTS ON APPEAL.			
10/29/90	RNB	10.50	945.00
FURTHER PREPARATION FOR AND ATTEND ORAL ARGUMENT; ATTEND CONFERENCE WITH STAFF COUNSEL STANLEY BASS AND ATTORNEYS PEARSON AND CLAPP.			
11/05/90	RNB	2.80	252.00
TELEPHONE CONFERENCE WITH ATTOR- NEY PEARSON REGARDING ORAL ARGU- MENT AND SETTLEMENT STRATEGY; TELEPHONE CONFERENCE WITH ATTOR- NEY CLAPP REGARDING CITY'S SETTLE- MENT OFFER; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON AND ATTORNEY GALLAGHER REGARDING CITY'S SETTLE- MENT OFFER; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON AND ATTORNEY CLAPP REGARDING REJECTION OF CITY'S SETTLEMENT OFFER; FOLLOW-UP TELE- PHONE CONFERENCE WITH ATTORNEY			

PEARSON IN PREPARATION FOR CONFERENCE CALL TO STAFF COUNSEL STANLEY BASS; TELEPHONE CONFERENCE WITH STAFF COUNSEL BASS, AND ATTORNEYS PEARSON AND CLAPP REGARDING SETTLEMENT; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; TELEPHONE CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING FEES AND COSTS INCURRED SINCE 31 OCTOBER 1989.

11/12/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S DECISION NOT TO INCREASE SETTLEMENT OFFER.			
11/13/90	RNB	0.30	27.00
TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN AND STAFF COUNSEL BASS' ASSISTANCE REGARDING CITY'S DECISION NOT TO INCREASE OFFER OF SETTLEMENT.			
12/04/90	RNB	0.80	72.00
LEGAL RESEARCH UPDATE ON NOTICE REQUIREMENTS AND GOVERNMENTAL ACTION PREEMPTION UNDER CITIZEN SUIT PROVISION OF RCRA.			
01/17/91	RNB	0.30	33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR SUPPLEMENTATION APPLICATION FOR FEES AND COSTS IN THE EVENT THE SECOND CIRCUIT COURT OF APPEALS AFFIRMS THE DECISIONS BELOW.			

03/25/91	RNB	0.30	33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING APPEAL AND PLAN COURSE OF ACTION IN THE AFTERMATH OF DECISION.			
04/08/91	RNB	0.30	33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR APPLICATION FOR FEE AWARD AND DISPOSITION OF PENDANT STATE CLAIMS.			
05/16/91	MJC	0.80	48.00
TELEPHONE CONFERENCE WITH DON BISSETTE REGARDING INQUIRY INTO STATUS OF CASE; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.			
06/12/91	JCG	1.10	159.50
TELEPHONE CONFERENCE WITH ATTORNEYS PEARSON AND BLAND REGARDING TODAY'S DECISION FROM SECOND CIRCUIT AND REGARDING FUTURE EFFORTS, INCLUDING SUPPLEMENTAL FEE APPLICATION, RELATING THERETO; PREPARE AND FORWARD TO ATTORNEY PEARSON SUPPLEMENTAL DRAFT BILL.			
06/13/91	JCG	0.50	72.50
REVIEW DECISION RECEIVED FROM SECOND CIRCUIT; RETRIEVE COPY OF PRIOR FEE APPLICATION AND SUPPORTING DOCUMENTATION.			
06/14/91	JCG	0.40	58.00
TELEPHONE CONFERENCE WITH A ATTORNEY BRIGGS REGARDING ARRANGEMENTS FOR SUPPLEMENTAL FEE APPLICATION; REVIEW 23 U.S.C. § 1961.			

06/14/91	HB	0.30	43.50
TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SUPPLEMENTAL FEE APPLICATIONS.			
06/17/91	JCG	0.60	87.00
TELEPHONE CONFERENCE WITH ATTORNEY BRIGGS REGARDING SECOND CIRCUIT MANDATE AND INTEREST CLAIM; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING LOGISTICS OF FEE APPLICATION AND SUPPORTING MATERIAL.			
06/17/91	KEW	7.20	252.00
SUPPORTING DOCUMENTATION FOR FEE APPLICATION REQUEST.			
06/17/91	ART	7.20	648.00
DRAFT MEMORANDA IN SUPPORT OF BILL OF COSTS TO BE SUBMITTED IN DISTRICT COURT AND SECOND CIRCUIT; DRAFT ATTORNEY AFFIDAVITS IN SUPPORT OF FEE REQUEST TO SECOND CIRCUIT; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING FEE REQUEST; DRAFT NOTICE OF MOTION; WORK ON SUPPORTING DOCUMENTATION FOR EXPENSE REQUEST.			
06/17/91	HB	6.00	870.00
LEGAL RESEARCH AND STARTING TO PREPARE APPLICATIONS FOR ATTORNEYS FEES AND BILLS OF COSTS.			
06/18/91	HB	3.20	464.00
PREPARATION OF MEMORANDA IN SUPPORT OF FEE APPLICATIONS.			
06/18/91	ART	6.90	621.00
CONTINUE WORK ON MOTIONS FOR ATTORNEY FEES AND BILLS OF COST TO BE			

FILED WITH BOTH SECOND CIRCUIT AND DISTRICT COURT; DRAFT MOTION FOR ATTORNEY FEES IN DISTRICT COURT.

06/20/91	HB	4.00	580.00
CONTINUING PREPARATION OF FEE APPLICATIONS AND BILL OF COSTS TO SECOND CIRCUIT AND DISTRICT COURT.			
06/20/91	MJC	3.10	186.00
PREPARATION OF EXPENSES FOR FEE APPLICATIONS.			
06/21/91	HB	2.50	362.50
CONTINUING PREPARATION OF FEE APPLICATIONS.			
06/21/91	MJC	4.00	240.00
FINALIZING EXPENSE INFORMATION.			
06/24/91	HB	6.70	971.50
FINAL REVIEW AND EDITING OF FEE APPLICATIONS.			
06/24/91	ART	7.30	657.00
FINAL REVIEW AND EDITING OF FEE APPLICATIONS			
06/24/91	MJC	1.00	60.00
FINAL COLLATING AND FILING OF FEE APPLICATIONS.			

James C. Gallagher	2.60 HOURS AT 145.00 /HR =	377.00
Heather Briggs	22.70 HOURS AT 145.00 /HR =	3,291.50
Richard N. Bland	0.90 HOURS AT 110.00 /HR =	99.00
Richard N. Bland	256.80 HOURS AT 90.00 /HR =	23,112.00

Anita R. Tuttle				
14.20 HOURS AT	90.00	/HR	=	1,278.00
Michael J. Case				
8.90 HOURS AT	60.00	/HR	=	534.00
Michael J. Case				
2.70 HOURS AT	55.00	/HR	=	148.50
Keith E. Wexelblatt				
7.20 HOURS AT	35.00	/HR	=	252.00
TOTAL SERVICES RENDERED				<u>\$29,092.00</u>

EXHIBIT 2

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE)	
Plaintiffs-Appellees,)	
v.	)	Docket No. 90-7544
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

STATE OF ARIZONA)
) ss AFFIDAVIT
COUNTY OF PIMA)

William W. Pearson, being duly sworn, deposes and states as follows:

1. From the beginning of this action until May 30, 1989, I was a partner in the law firm of Downs, Rachlin & Martin, attorneys for plaintiffs in this action. Since June 1, 1989, I have been with the firm of Molloy, Jones & Donahue in Tucson, Arizona. This affidavit provides additional support for plaintiffs' application for the award of fees and costs on appeal pursuant to this Court's Order of June 12, 1991, and 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2. My relevant background is as follows:

- B.A. degree from University of Chicago in 1968
- J.D. degree from Georgetown University Law Center in 1971
- Admitted to Indiana Bar and U.S. District Court, Southern District of Indiana in 1971
- Admitted to Vermont Bar in 1975 and the U.S. District Court, District of Vermont in 1977
- Admitted to U.S. Court of Appeals, 2nd Circuit in 1986
- Admitted to Arizona Bar and U.S. District Court, District of Arizona in 1989.

3. I am an experienced trial attorney in the field of environmental law. I have handled a variety of environmental legal problems including hazardous and solid waste management, toxic torts, NPDES permits, landfills, lender liability for environmental hazards, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

4. In practicing environmental law in Vermont, it is my experience that a very high percentage of fee paying clients retain big city, national law firms to do their high stakes, sophisticated environmental work. For example, Downs, Rachlin & Martin is one of only a couple Vermont law firms who are lead counsel for a significant party in Vermont's Superfund sites. The other significant parties are represented by law firms from such places as Boston, New York City, and Washington, D.C. These outside Vermont firms are hired because the laws are complex, the technical issues sophisticated and the financial stakes are high. Commensurate with their experience and expertise, these out-of-state firms charge hourly fees substantially higher than their Vermont counterparts.

5. Presently, I am responsible for the environmental practice in Molloy, Jones & Donahue, which is one of the premier law firms in Tucson, Arizona, a city whose population is greater than all of Vermont. I am continuing my environmental law practice in the areas outlined above. My present hourly rate is \$170.00 per hour.

6. Attached to this Affidavit is an account of legal services provided by me in this action from May 7, 1990 to present. During this time, I kept contemporaneous

records of the date and time spent working on this case. I also made contemporaneous description entries for the work done.

7. I have reviewed the attachments to Exhibits 1 and 2. To the best of my knowledge, Exhibits 1 and 2 are fair and accurate itemizations of the legal services and costs related to this action for the time period stated herein, including necessary travel costs to New York to argue this appeal.

8. Concerning the plaintiffs' application for an enhancement of the fees as stated, it is my considered judgment that the plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself based on the following:

- a. The plaintiffs had no funds with which to pay for legal services on an up-front basis;
- b. At the time this suit was brought Attorney Bland and I were among a handful of Vermont lawyers sufficiently sophisticated in this specialized area to handle plaintiffs' claims;
- c. Defendant is a political subdivision which does not function or have priorities like a private sector party thereby increasing the uncertainty of a strategy and outcome;
- d. The enormous up-front expense in this case of services and costs incurred would be prohibitive to all but larger law firms.

9. In summary, in my professional judgment, the total lodestar and enhancement requested are reasonable

and appropriate given all the factors listed in the Application itself and in this affidavit.

/s/ William W. Pearson
William W. Pearson

SUBSCRIBED AND SWORN TO before me this 21
day of June, 1991, by William W. Pearson.

/s/ Steffney R. Thompson
Notary Public

My Commission Expires:

My Commission Expires November 11, 1994

BILLING STATEMENT OF
WILLIAM W. PEARSON, ESQ.
TUCSON, ARIZONA

June 25, 1991

Mr. Ernie Dague, Sr.
Estate of Ernie Dague, Jr.
Mrs. Betty Dague
Ms. Rose Bessette
Manhattan Drive
Burlington, Vermont 05401

File Number: 2369-0001

For Period: May 8, 1990 to June 25, 1991

Matter: Dague v. City of Burlington
Second Circuit Appeal

Sample Entry -

Date:	Hours:	Amount:
Description of Services:		
5/08/90	2.2	374.00
Read and analyze Judge Billing's order granting city's Rule 54(b) request; check rule for format; phone conference with attorney Bland		
5/09/90	1.7	289.00
Outline strategy for pre-appeal preparation by selecting issues updated research needed		
6/06/90	1.0	170.00
Read city's notice of appeal; lengthy phone conference with attorney Bland; analyze what issues might be raised in cross-appeal		
6/08/90	4.8	816.00
Review Second Circuit appeal procedures; further analysis of cross-appeal issues; do overview of memoranda filed to date and identify issues needing further research and update; lengthy phone conference with attorney Bland		
6/11/90	1.0	170.00
Very lengthy phone conference with attorney Bland on appeal procedures, cross appeal, city's appeal issues and possible waiver of notice claim		
6/18/90	2.7	459.00
Read and analyze city's form C and pre-argument statement; compare issues to those already fully addressed in prior memoranda; lengthy phone conference with attorney Bland		
6/19/90	0.3	51.00
Phone conference with attorney Bland on appeal		

6/21/90	0.5	85.00
Phone conference with attorney Bland on Sierra Club as <i>amicus curiae</i>		
6/25/90	1.3	221.00
Review court scheduling order; develop check-list of essential documents to be included in record on appeal		
6/26/90	0.8	136.00
Review city's letter to 2nd Circuit court clerk analyze options with attorney Bland on scheduling and appeal work allocation		
6/29/90	0.3	51.00
Phone conference with attorney Bland on hearing postponement		
7/02/90	0.2	34.00
Read 2nd Circuit's rescheduling order		
7/03/90	0.5	85.00
Lengthy phone conference with attorney Bland about rescheduling order and strategy at pre-argument conference		
7/08/90	6.3	1071.00
Prepare for pre-argument conference by reviewing all court orders, motions and memos related to appeal issues		
7/09/90	0.3	51.00
Phone conference with attorney Bland on positions to take in pre-argument conference		
7/10/90	4.8	816.00
Finalize preparation for pre-argument conference; several extended phone conferences with attorney Bland on pre-argument conference; pre-argument conference held with city and Staff Attorney Bass		

7/13/90	0.5	85.00
Extended phone conference with attorney Bland on research status and record on appeal status		
7/16/90	0.8	136.00
Review city document designation; review notice of appearance requirements		
7/19/90	6.3	1071.00
Begin outline of appeal issues and arguments in 2nd Circuit; review case copies available and locate additional copies needed; analyze city's possible claims about dismissed third parties; review Rule 54(b) problem at appeal; check for additional case law after <i>Hallstrom</i> ; outline issues to discuss with attorney Bland and the city		
7/20/90	0.8	136.00
Phone conference with attorney Bland; send package to attorney Bland with notice of appearance		
7/27/90	0.3	51.00
Status review on city's brief		
7/30/90	5.0	850.00
Read and analyze city's brief; list issues to be responded to; lists errors in statement of facts, case and issues		
8/03/90	3.8	646.00
List significant facts to be included in plaintiffs' statement of facts; research cases cited by city on railroad culvert as point source and standard of proof necessary for finding of substantial and imminent and endangerment; lengthy phone conference with attorney Bland on brief progress and its several subparts as well as overall strategy		

8/04/90	4.5	765.00
Further research on issues begun yesterday; in particular whether state authorized program pre-empts or precludes citizens' suit action; further analysis of notice question both as to substance on regulation [sic] compliance and subject matter jurisdiction		
8/17/90	5.8	986.00
Read and analyze appellee's draft brief; several phone conferences with attorney Bland		
8/18/90	7.8	1326.00
Detailed reading and editing of appellee's brief focusing on argument I (notice) and II (culvert is a point source).		
8/19/90	5.4	918.00
Detailed reading and editing of appellee's brief focusing on argument III (imminent and substantial) and argument IV (attorney's fees); reread city brief for comparison and further edits		
8/20/90	2.5	425.00
Review draft brief further; phone conference to attorney Bland		
8/21/90	1.8	306.00
Further analysis of brief with final edits; several phone conferences with attorney Bland		
8/29/90	1.8	306.00
Phone conference with attorney Bland on oral argument at 2nd Circuit; initial outline of presentation		
8/31/90	0.3	51.00
Phone conference with attorney Bland on oral argument casebook, record on appeal and legislative history		

9/05/90	2.5	425.00
Read and analyze city's reply brief; compare first brief for any changes in strategy		
9/06/90	1.0	170.00
Further review of city's reply brief; phone conference with attorney Bland on city's brief		
9/14/90	0.3	51.00
Phone conference with attorney Bland on oral argument		
10/09/90	0.6	102.00
Review notice of oral argument; phone conference with attorney Bland about argument strategy		
10/10/90 [sic]	0.3	51.00
Make travel arrangements for argument in New York		
10/12/90	2.0	340.00
Begin detailed preparation for oral argument; Outline argument relative to notice; phone conference with attorney Bland		
10/16/90	1.5	255.00
Outline argument relative to culvert as point source		
10/22/90	4.0	680.00
Read city's briefs and compare to plaintiff's briefs on all significant points;		
10/24/90	2.2	374.00
Review notice issues, point source issues and Rule 54(b) issue; phone conference with attorney Bland;		
10/25/90	6.4	1088.00
Draft final outline of argument; draft individual cards for each appeal issue; begin final review of		

significant [sic] cases on each point; phone conference with attorney Bland		
10/26/90	8.0	1360.00
Travel to New York for argument		
10/28/90	6.2	1054.00
Final review prior to argument on all issues; read remaining cases, in particular <i>Halstrom</i> , <i>Ottati</i> and <i>Earth Sciences</i> ; review of these issues with attorney Bland		
10/29/90	12.8	2176.00
Final preparation for argument; oral argument before Second Circuit; meeting with Staff Counsel Bass and city; return to Arizona		
11/05/90	2.0	340.00
Numerous phone calls with and between Staff Counsel Bass, city, attorney Bland and attorney Gallagher about settlement		
11/12/90	0.3	51.00
Phone conference with attorney Bland about city's no movement settlement posture		
1/17/91	0.3	51.00
Phone conference with attorney Bland on status of appeal decision and additional application for fees if the appeal is successful		
3/25/91	0.3	51.00
Status phone conference with attorney Bland		
4/08/91	0.3	51.00
Status phone conference with attorney Bland		
6/12/91	1.0	170.00
Phone conference with attorney Bland on Second Circuit decision; phone conference with clients about decision;		

6/17/91	2.5	425.00
Read Second Circuit decision in detail; phone conference with Court on entry of judgment; phone conference with attorney Bland; phone conference with attorney Clapp for city		
6/18/91	1.5	255.00
Review supplemental petition for fee requirements; collect data for entry into supplemental petition.		
6/19/91	5.8	986.00
Draft and edit supplemental petition for fees and costs from October 31, 1989 to June 25, 1991		
William W. Pearson		
141.9 hours at \$170.00/hour = \$ 24,223.00		
Total Services Rendered \$24,223.00		

DISBURSEMENTS

DESCRIPTION	AMOUNT
Travel	444.00
Travel	725.00
Total	1169.00

FINAL SUMMARY

DESCRIPTION	AMOUNT
CURRENT FEES	\$ 24,223.00
CURRENT DISBURSEMENTS	1169.00
CURRENT INVOICE TOTAL	\$ 25,292.00

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiff-Appellees,	)	Docket No.
	)	90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT OF ROBERT A. MELLO

Robert A. Mello, being duly sworn, deposes and states the following:

1.

I am an attorney in South Burlington, Vermont. I graduated from St. John's Seminary in 1968 and Boston College (J.D., 1971), and I have been in practice in the Burlington area since 1975.

2.

Having practiced law in Burlington, Vermont for approximately 19 years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

My customary billing rate for fee-paying clients is \$105-135 per hour.

4.

I am professionally and personally acquainted with William Pearson and Richard N. Bland, formerly with the law firm of Downs Rachlin & Martin, and I believe them to possess a high degree of knowledge and expertise in the field of environmental law.

5.

I understand that the current billing rate charged by Mr. Pearson is \$170 per hour, and that charged by Mr. Bland is \$100 per hour. I further understand that the billing rates for attorneys in the firm of Downs Rachlin & Martin range from \$60-\$175 per hour, depending upon the level of experience. I also understand that the billing rates for legal assistants in the firm of Downs Rachlin & Martin range from \$50-\$65 per hour, depending upon the level of experience.

Based upon my own hourly rate, and my general knowledge of the hourly rates charged by other attorneys and legal assistants in the Burlington area, I believe that the hourly rates charged by the law firm of Downs Rachlin & Martin are within the range of hourly rates charged by other law firms in the Burlington area.

6.

I engage in the general practice of law. When I take on plaintiffs' work on a contingency basis, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Robert A. Mello
Robert A. Mello

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 21st day of June, 1991.

/s/ Joanne Aja Simpson
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiff-Appellees,	)	Docket No.
	)	90-7544
v.)	
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT OF JON R. EGGLESTON

Jon R. Eggleston, being duly sworn, deposes and states the following:

1.

I am a duly licensed attorney admitted to practice in Vermont. I received my B.A. from the University of Denver in 1968, my J.D. from Cornell University in 1971 and an LL.M. in Taxation in 1975 from the Georgetown University Law Center. I am admitted to practice before the U.S. District Court for the District of Vermont.

2.

I am a partner in the firm of Miller, Eggleston & Rosenberg in Burlington, Vermont and am engaged in general corporate law and taxation.

3.

Having practiced law in Vermont since 1971, I am familiar with hourly rates charged by law firms and attorneys in the Burlington area.

4.

I personally charge clients at the rate of \$175 per hour.

5.

Based upon my own hourly rate, and my knowledge of the fees customarily charged by attorneys in this community, I believe that the current hourly rates charged by William W. Pearson and Richard N. Bland, \$170 per hour and \$100 per hour, are reasonable hourly rates for the Burlington legal market.

6.

My firm seldom represents plaintiffs on a contingency fee basis. This is because a contingent fee which will be equal only to our usual hourly rates offers no incentive for taking on such work. Indeed, it is my belief, based on my knowledge and experience of the Burlington legal community, that lawyers who take such contingency cases expect to recover a multiple of their usual hourly rate if they were to avail in the case. Without this expectation, there is no incentive for taking a contingency case.

/s/ Jon R. Eggleston
Jon R. Eggleston

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 24th day of June, 1991.

/s/ Kimberly A. Coon
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST)	
DAGUE, JR., BETTY DAGUE,)	
and ROSE A. BESSETTE,)	
Plaintiff-Appellees,	)	Docket No.
v.	)	90-7544
CITY OF BURLINGTON,)	
Defendant-Appellant)	

AFFIDAVIT OF MICHAEL G. FURLONG

Michael G. Furlong, being duly sworn, deposes and states the following:

1.

I am a partner in the law firm of Sheehey Brue Gray & Furlong in Burlington, Vermont. I graduated from Middlebury College (B.A., 1973) and Cornell University (J.D., 1978), and I have been in practice in Burlington since 1978.

2.

Having practiced law in Burlington, Vermont for approximately thirteen years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

The customary billing rates for the attorneys in our firm range from \$95 to \$120 per hour. My customary billing rate is \$120 per hour.

I understand that the current billing rate charged by William W. Pearson is \$175 per hour.

I understand that the current billing rate charged by Richard N. Bland is \$100 per hour, and that the billing rates for other attorneys in the firm of Downs Rachin[sic] & Martin range from \$60 to \$175 per hour, depending upon the level of experience.

Based upon my own firm's billing practices and hourly rates, and my general knowledge of the fees customarily charged by other attorneys in Burlington, Vermont, I believe that the hourly rates charged by Mr. Pearson and the hourly rates charged by attorneys in the firm of Downs Rachlin & Martin are within the range of hourly rates charged by attorneys in the Burlington area.

5.

Our firm engages in the general practice of law, with a majority of our work involving business and commercial matters.

Our firm does not do extensive plaintiffs' work on a contingency fee basis. When we do so, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally

would return to the firm more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Michael G. Furlong
Michael G. Furlong

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 20th day of June, 1991.

/s/ Denise M. Longchamp
Notary Public
Commission Expires 2-10-95
